(22,525)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 218.

MARY E. NALLE, PLAINTIFF IN ERROR,

vs.

JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, AND BARTON W. EVERMANN.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

No. 2130.

MARY E. NALLE, Appellant,
vs.
JAMES F. OYSTER et al.

Supreme Court of the District of Columbia.

At Law. No. 50569.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed May 16, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50569.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN, Defendants.

The plaintiff sues the defendants for that, whereas, the plaintiff, now and at the time of the committing by the defendants of the grievances hereinafter mentioned, had always been a person of good reputation and for more than thirty years a teacher and member of the body of teachers in the public schools of the District of Columbia, and had always been considered a faithful, diligent, attentive, and most competent teacher, and an honest and upright citizen, yet, the defendants, well knowing the premises, and without probable cause so to do, but contriving and wickedly and maliciously

intending to injure plaintiff in her character and reputation as a competent school teacher and a member of the body of
2 teachers in the public schools of the District of Columbia, and a citizen as aforesaid, and to bring her into public scandal and disgrace and cause it to be suspected and believed by the public in general that the plaintiff was not competent to have continued to teach in the public schools by reason of having been found by defendants on examination to be deficient in the necessary academic and pedagogic equipment of a competent teacher, and thereby prevent plaintiff from earning her livelihood in her profession as a school teacher and to harass, oppress and deprive plaintiff of the means of supporting herself by such employment, did on the 17th day of May, 1907, at Washington, District of Columbia, wrongfully, maliciously and unjustly compose and publish, and cause to be composed and published and filed, and caused to be filed in the Clerk's office of the Supreme Court of the District of Columbia, a certain false, scandalous and defamatory libel of and concerning plaintiff and of and concerning her in and about her profession as a school teacher in the false, malicious and libelous words following:—

"These respondents (meaning the defendants and others composing the Board of Education of the District of Columbia) found on examination that the relator (meaning the plaintiff) was not sufficiently qualified in all respects to be competent to continue to teach during the ensuing year, (meaning to continue to teach in the public schools of the District of Columbia for the school year of 1906-1907) but was deficient in the necessary academic and pedagogic equipment of a competent teacher. These respondents (meaning defendants and others composing the Board of Education of the District of Columbia) were, therefore, unable lawfully to continue the employment of the relator (meaning plaintiff)"

By means of the committing of which said grievances the plaintiff has been greatly injured in her good name and character and brought into public scandal, disrepute and disgrace with and among all to whom she is in any wise known, and been caused to be believed and suspected inefficient and wholly unfit to be employed in the line of her business and profession as a school teacher aforesaid; and by reason whereof plaintiff has not only lost and been deprived of the support and emoluments which might otherwise and would have accrued to her by reason of her being so employed, and deprived of the opportunity of supporting herself by means of her business and profession, *and* has, been and is by and on account of said premises otherwise greatly injured and damnified in the sum of Twenty-five thousand ($25,000,000) dollars, and therefore, brings this suit.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Notice to Plead.

The defendant- *is* to plead on or before the twentieth day exclusive of Sundays and legal holidays occurring after the date of service hereof; otherwise judgment.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

3 *Amended Declaration.*

Filed Dec. 17, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50569.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER et al., Defendants.

With leave of court first had and obtained, plaintiff hereby amends her declaration filed with the court, in the particulars, as hereinafter set out.

First Count.

By physically inserting after the word "Columbia," where the word appears on the 7th line of the second page of the said declaration, the following words:—

"as their answer in a legal proceeding wherein they and others composing the Board of Education of the District of Columbia are named as defendants."

And by adding the following as the second and additional count to same.

"2nd. Plaintiff further sues the defendants for that whereas plaintiff is now, and at the time of the committing by the defendants of the grievances hereinafter mentioned, had always been, a person of good reputation, and, for more than thirty years, had been earning her livelihood as a teacher and member of the body of teachers of the public schools of the District of Columbia, and was then earning and receiving a salary of $1000 per annum, and had always been considered a diligent, faithful, attentive and most competent teacher and an honest and upright citizen. That the defendants, and certain others, at the time of the committing of the grievances hereinafter named, constituted the Board of Education of the District of Columbia, as provided for by the act of Congress, approved June 20, 1906. By said act, among other things, it is provided that when a teacher is on trial, or being investigated, she shall have the right to be attended by counsel. That on or about

the 3d day of September, 1906, there were certain untrue, malicious vague and indefinite charges concerning plaintiff's moral character and reputation, under investigation by the said Board of Education; that without notice to plaintiff that she was under investigation, or an opportunity given her to be heard, and contrary to law, on the 14th day of September, 1906, said Board of Education dismissed plaintiff from the rolls as a teacher in the public schools of the District of Columbia, assigning therefor that the same was done for the good of the service. That feeling aggrieved and wronged, and having failed to secure redress by a petition direct to the Board of Education, plaintiff availed herself of the right to petition the Supreme Court of the District of Columbia for a writ of mandamus, to compel said Board of Education to reinstate her to the posi-
4 tion and emoluments of her office, as she had a lawful right to do. That said defendants designing and intending to wrong, annoy disturb, hinder, prevent, interfere with, oppress and injure plaintiff in her right to employ her time and talents, and to direct her energies and labor in the line of her occupation and calling as she saw fit, and specifically to prevent her from securing the writ of mandamus to reinstate her to her position and to the emoluments of her office, as a member of the body of teachers of the public schools of the District of Columbia, did, sometime previous to the grievances hereinafter complained of, unlawfully, wrongfully and maliciously and with the specific intent, purpose and design of annoying, disturbing, hindering, preventing, interfering with, oppressing, and injuring plaintiff, enter into an unlawful agreement, combination, confederation and conspiracy among themselves to ruin plaintiff, and to specifically prevent her from obtaining her proper redress as prayed for, and to which she was entitled in the mandamus proceedings aforesaid and to cause it to be believed by the public in general that she was deficient in the necessary academic and pedagogic equipment of a competent teacher, and thereby prevent her from securing employment as a school teacher. In pursuance to their aforesaid plan and conspiracy to injure and ruin the plaintiff, the defendants maliciously and unjustly composed and published, and caused to be composed and published and filed, and caused to be, filed in the Clerk's office of the Supreme Court of the District of Columbia, a certain paper purporting to be *in* their answer, and the answer of other members of the Board of Education, which contained certain false and scandalous and defamatory libel of and concerning plaintiff, and of, and concerning her in and about her profession as a school teacher, in the false and malicious and libelous words following:

"These respondents (meaning the defendants and others composing the Board of Education of the District of Columbia) found on examination that the relator (meaning the plaintiff) *were* not sufficiently qualified in all respects to be competent to continue to teach during the ensuing year (meaning to continue to teach in the public schools of the District of Columbia for the school year of 1906-1907) but was deficient in the necessary academic and pedagogic equipment of a competent teacher. These respondents (mean-

ing defendants and others composing the Board of Education of the District of Columbia) were therefore, unable lawfully to continue the employment of the relator (meaning plaintiff)."

The defendants, and each of them, knew at the time of the publication of said paper that the Board of Education had in fact made no examination of plaintiff's qualifications as to competency, either pedagogically or academically; that defendants, and each of them, knew that no one else in behalf of the Board of Education, or in behalf of any members thereof, had ever examined or attempted to examine plaintiff, or made, or have made, any examination of her work for the purpose of determining her competency, academically and pedagogically; that the defendants, and each of them knew at the time of the composing and filing of aforesaid
5 false and malicious and defamatory libel that plaintiff was thouroughly proficient, both pedagogically and academically, and was so recognized by all who knew her both in and out of the schools; and the defendants, and each of them, knew at the time of the composition and publication of the aforesaid false, scandalous and defamatory libel that the facts therein alleged were absolutely false in fact and done and intended to be done as and for a mere subterfuge all of which was done in pursuance of their aforesaid unlawful agreement and design to annoy, disturb, hinder, interfere with, oppress and injure plaintiff in her aforesaid pursuit. That by reason of the committing by defendants of the aforesaid grievances plaintiff was prevented from securing a fair and impartial hearing in the mandamus proceedings, and was prevented from being reinstated to her office as a member of the body of teachers of the public schools of the District of Columbia and receiving the emoluments thereof; and she has been greatly injured in her good name and character and brought into public scandal, disrepute and disgrace with and among all to whom she is in any wise known, and been caused to be believed and suspected of being inefficient and wholly unfit to be employed in the line of her business and profession as a school teacher aforesaid, and by reason thereof, plaintiff has been unable to secure any employment in the line of her profession aforesaid; and has lost and been deprived of the support and emoluments which would otherwise have accrued to her by reason of her being so employed, and has been and is, by and on account of said premises, otherwise greatly injured and dammified in the sum of Twenty-five thousand ($25000) dollars, and therefore brings this suit.

And the plaintiff claims Twenty five thousand ($25000) damages, besides costs.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Demurrer.

Filed Dec. 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50569.

MARY E. NALLE, Plaintiff,

vs.

JAMES F. OYSTER, WILLIAM V. COX, MARY E. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN, Defendants.

The defendants say that the first count in the amended declaration filed in the above entitled cause, is bad in substance, and demur thereto; and that the second count of the amended declaration filed in the above entitled cause is bad in substance, and demur thereto.

DANIEL W. BAKER,
F. SPRIGG PERRY,
Attorneys for Defendants.

6 *Note.*

In support of the above demurrer, the following, among other grounds, are to be argued:

1. The alleged publication complained of and set out in the declaration is not libelous.

2. The words complained of and set out in the declaration herein are not libelous.

3. It does not appear in and by the said declaration that any legal damage or any legal injury has resulted to the plaintiff, actually or by implication of law, from the publication complained of in the declaration.

4. It appears by the said declaration that the defendants filed the paper containing the published words complained of by the plaintiff in the said declaration as a pleading in the Supreme Court of the District of Columbia in the case wherein the defendants were impleaded and in answer to the subject matter of the suit, and accordingly the same is privileged.

5. It appears from the said declaration that the said paper containing the alleged libel complained of is the pleading filed by the defendants in the Supreme Court of the District of Columbia, in a suit wherein they were impleaded, setting forth their official act, judgment and answer as the Board of Education of the District of Columbia with respect to the plaintiff, and accordingly the same is privileged.

6. It appears from the said declaration that the statement constituting the alleged libel complained of by the plaintiff in the said

declaration is the official report of the defendants in their capacities as the Board of Education of the District of Columbia, made in the ordinary course of their duties as such Board of Education of the District of Columbia, with respect to the plaintiff as a former employee of the said Board of Education of the District of Columbia, and accordingly the same is privileged.

7. And for other grounds.

In the Supreme Court of the District of Columbia.

THURSDAY, *December* 23, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 50569. At Law.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER et al., Defendants.

Upon consideration of defendants' demurrer filed herein to plaintiff's declaration as amended it is ordered that said demurrer be and the same is hereby sustained as to the first count of said declaration and overruled as to the second count thereof, with leave to plead within twenty days.

7 *Pleas.*

Filed Jan. 15, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 50569.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER et al., Defendants.

Now come the defendants and each of them, and for joint and several pleas to the amended declaration in the above entitled cause say:

1. The plaintiff herein, on to wit, the nineteenth day of April, A. D. 1907, in the Supreme Court of the District of Columbia, and in a matter within the jurisdiction of said court, impleaded the said defendants and each of them in a certain cause entitled to wit, United States of America ex rel. Mary E. Nalle, Relator, vs. George W. Baird, Oliver M. Atwood, John F. Cook, William V. Cox, Barton W. Evermann, Justina R. Hill, Ellen Spencer Mussey, James F. Oyster, and Mary C. Terrell, Respondents, on the

law side of the Court, Number 49,364, in a certain petition for the writ of mandamus for the restoration of the said plaintiff to the rolls as a teacher in the public schools of the District of Columbia, whereupon the defendants made answer and issue was joined thereon, and such proceedings were thereupon had in the said cause in that court, and for and in respect of the same identical causes of action in the said pleadings mentioned, that afterwards, to wit, on the nineteenth day of June, A. D. 1907, by the consideration and judgment of the said court, and upon an issue necessarily involved in said cause, and litigated therein between said parties, and identical with the causes of action herein given, it was ordered that the writ of mandamus be, and it was thereupon denied, and the petition dismissed, as by the record and proceedings thereof still remaining in the said Supreme Court of the District of Columbia more fully and at large appears, a copy of which is hereto attached marked Exhibit A and made a part hereof, which said judgment still remains in full force and effect, not in the least reversed, satisfied or made void, and this the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain this said action against them or any of them.

2. And for a further joint and several plea to the amended declaration in the above entitled cause, say, that the defendants, and each of them, on the fourteenth day of September, A. D. 1906 and for a long time prior thereto, constituted the Board of Education of the District of Columbia, in which was vested the control of the public schools of the District of Columbia, under and by virtue of the laws of the United States; and that on the day and year aforesaid, and for a long time prior thereto, one Mary E. Nalle was a teacher in the public schools of the District of Columbia, and that on said day and year the said defendants, as the Board of Education, acting in accordance with the law and by virtue of the authority vested in them as such board, dismissed the said Mary E. Nalle from the position of teacher in the public schools of the District of Columbia; and that thereafter, to wit, on the

8 nineteenth day of April, A. D. 1907, the plaintiff herein, in the Supreme Court of the District of Columbia and in a manner within the jurisdiction of said court impleaded the said defendants, and each of them, in a certain cause entitled, to wit, United States of America, ex rel. Mary E. Nalle, Relator, vs. George W. Baird, Oliver M. Atwood, John F. Cook, William V. Cox, Barton W. Evermann, Justina R. Hill, Ellen Spencer Mussey, James F. Oyster and Mary C. Terrell, respondents, on the law side of the court No. 49,364, in a certain petition for the writ of mandamus for the restoration of the said plaintiff to the rolls as a teacher in the public schools of the District of Columbia; and that thereafter, on, to wit, the seventeenth day of May, A. D. 1907, your defendants, as respondents in said action of mandamus, filed an answer in the Supreme Court of the District of Columbia, in said suit, and in and by said answer, and upon a matter material, relevant, pertinent, and necessarily involved in said cause and litigated therein between the said parties, set up the identical matters and writings complained of

in the present suit and thereupon set up in said answer and as a response to the allegations of said petition the following writing upon which this present suit is based, to wit:

"These respondents (meaning the defendants and others composing the Board of Education of the District of Columbia) found on examination that the relator (meaning the plaintiff) was not sufficiently qualified in all respects to be competent to continue to teach during the ensuing year (meaning to continue to teach in the public schools of the District of Columbia for the school year of 1906-1907) but was deficient in the necessary academic and pedagogic equipment of a competent teacher. These respondents (meaning defendants and others composing the Board of Education of the District of Columbia) were therefore, unable lawfully to continue the employment of the relator (meaning plaintiff)".

and that such proceedings were thereafter had upon said cause in that Court, that afterwards, on, to wit, the nineteenth day of June, in the year of our Lord one thousand nine hundred and seven, by the consideration and judgment of the said court, and upon an issue necessarily involved in said cause and litigated therein between the said parties, it was ordered that the writ of mandamus be, and it was thereupon denied, and the petition dismissed, as by the record and proceedings thereof still remaining in the said Supreme Court of the District of Columbia, more fully and at large appears, a copy of which is hereto attached, marked Exhibit A and made a part hereof, which said judgment still remains in full force and effect, not in the least reversed, satisfied or made void, and this, the said defendants, are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain this said action against them or any of them.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.
F. SPRIGG PERRY,
Assistant Attorney of the United States in and for the District of Columbia,
Attorneys for Defendants.

EXHIBIT "A."

9 *Petition.*

In the Supreme Court of the District of Columbia.

At Law. No. 49364.

UNITED STATES OF AMERICA ex Rel. MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD, OLIVER M. ATWOOD, JOHN F. COOK, WILLIAM V. COX, Barton W. Evermann, Justina R. Hill, Ellen Spencer Mussey, James F. Oyster, and Mary C. Terrell, Respondents.

The above-named relator, Mary E. Nalle, states as follows:

1. That she is a citizen of the United States and a resident of the District of Columbia, and files this petition in her own right.

2. The respondents are citizens of the United States and residents of the District of Columbia, and constitute the Board of Edu-
10 cation in which is vested control of the public schools of the District of Columbia under and by virtue of the certain Act of the Congress of the United States in that behalf, approved June 20, 1906, and the respondents are sued as such.

3. On July 1, 1906, by Act of Congress of the United States in that behalf, approved June 20, 1906, the control of the public schools of the District of Columbia was vested in a Board of Education to consist of nine members to be appointed by the Supreme Court judges of the said District, and on, to wit, July 3, 1906, the said judges duly appointed the respondents, except the respondent Mussey, together with one Brewer members of the said Board and the said Board was on, to wit, the fifth day of July, 1906, duly organized and since has been, and now is, the Board of Education contemplated and provided for by the said Act; and the said Brewer having declined her appointment as a member of the said Board, the said judges thereupon and prior to October 17, 1906, appointed in her place and stead the respondent Mussey who accepted said appointment; and on and prior to the said last-mentioned day the respondents were, continuously have been, and now are, the Board of Education aforesaid.

4. In and by the said Act, it is among other things provided that the Board of Education shall appoint one superintendent for all the public schools in the District of Columbia "who shall have a seat in the Board and a right to speak on all matters before the Board, but not the right to vote;" and that the said Board upon the written recommendation of the said superintendent shall also appoint one colored assistant superintendent for the colored schools who shall, under the direction of the superintendent, have sole charge of all teachers, classes, and schools in which colored children are taught; and further that no appointment, promotion, transfer, or dismissal of any director, supervising principal, principal, head of department,

teacher, or any other instructor of the schools, shall be made by the Board of Education except upon the written recommendation of the superintendent of schools; and that when a teacher is on trial or being investigated, he or she shall have the right to be attended by counsel and by at least one friend of his or her selection.

5. Under and by virtue of the authority in that behalf as aforesaid, the said Board of Education prior to September 1, 1906, appointed as superintendent of all the public schools in the District of Columbia aforesaid one William E. Chancellor, who accepted and assumed the said office and who continuously since has been, and now is, such superintendent; and during the time last aforesaid one Wingfield Scott Montgomery was, and now is, the colored assistant superintendent for the colored schools of the said District as aforesaid.

6. The relator since the month of September, 1873, has been respectively assistant teacher and teacher in, of, and for, the said public schools as follows:

To wit, in September, 1873, she was appointed assistant teacher at a salary of four hundred dollars ($400.00) per annum, and was assigned to the Sumner school and from there transferred to
11 the Lincoln school; on or about the month of September, 1874, she was promoted and sent to the John F. Cook school and assigned to the second grade at a salary of five hundred dollars ($500.00) per annum where she continuously taught up to and including the year of 1879 and in June of said year was teaching the fourth grade at said school and her salary during said period had been increased, from time to time, until June of said year she was receiving six hundred dollars ($600.00) per annum; on, to wit the first day of September, 1879, she was transferred to the Sumner school and taught the fifth grade, and during the same year was assigned to and taught the sixth grade; on, to wit, September the first, 1880, she was transferred, assigned to, and taught the sixth grade at the Randall school; and on, to wit, September 1, 1881, was transferred, assigned to, and taught the fifth and sixth grades at Lincoln school; on, to wit, September 1, 1882, she was transferred, assigned to, and taught the sixth and seventh grades at the John F. Cook school and was promoted and her salary increased to six hundred fifty dollars ($650.00) per annum, and did remain teaching at said school continuously up to June, 1889, and from time to time was promoted and did receive increase of salary when in June, 1889, she was receiving eight hundred twenty-five dollars ($825.00) per annum and on or about the first of September, 1889, was promoted and assigned to the high school as teacher of English where she remained during the school year of 1890-91, during which year her salary was increased to nine hundred dollars ($900.00) per annum; and where she continued to teach English, stenography, and type-writing, and part of the time, penmanship and arithmetic up to and including the year 1895, at which time her salary had reached the sum of nine hundred fifty dollars ($950.00) per annum from which time to the year 1901 she continued to teach said branches in the said school and during which time her salary had

been increased to the sum of one thousand dollars ($1000.00) per annum; on, to wit, September 1, 1901, the business department of the high school in which she was teaching was consolidated with the manual training pupils at which time she was assigned to and taught the subject of English in the consolidated school; on, to wit, September 1, 1902, she was transferred to the M Street high school and was assigned and did teach the subject of English in the first and second year classes and did from then on continue to teach said subject to the said classes in the said school up to and including the ending of the school year 1905-1906 at which time she was receiving a salary of one thousand dollars ($1000.00) per annum; and on, to wit, July 1, 1906, was a member of the teaching force of the public schools of the District of Columbia in good standing, and did then so continue to be up to and including the fourteenth day of September, 1906.

7. On, to wit, September 4, 1906, the relator received the following summons from Chancellor, the superintendent, namely:

12 BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA,
FRANKLIN SCHOOL BUILDING,
WASHINGTON, D. C., *September* 3, 1906.

DEAR MISS NALLE: Dr. Chancellor requests you to call at his office Tuesday, September fourth, at nine o'clock A. M.

Very truly yours,

W. S. MONTGOMERY,
Ass't Sup't.

The relator did not receive said communication until too late to comply therewith which fact was communicated by letter to the said superintendent, which letter was as follows:

3215 FOURTEENTH ST.
BROOKLAND, D. C., *September* 9, 1906.

Doctor William E. Chancellor, Franklin Building.

DEAR SIR: On Tuesday last, I received a note, telling me to call at your office before noon of that day. I did so; but you were too busy to see any of those waiting for you. A note sent me by Mr. Montgomery, requesting me to call at the office at nine o'clock did not reach me until four o'clock that afternoon. As the note had been sent to my old address it failed to reach me in time for an early visit to the office.

Will you see me this morning or will you specify some other time when you will be able to do so?

Very respectfully,

MARY E. NALLE.

In response to said communication, the relator received notice from said superintendent to call at his office on September eleventh, between the hours of two and five. She did so and had an interview with said superintendent during which said superintendent inquired of the relator as to trouble at the M Street high school, the relator

informing him that she was one of ten teachers of the high school summoned by Mr. Percy M. Hughes, the then director of high schools, to testify in the case of the then principal of said school.

8. On the thirteenth day of September, 1906, the relator had another interview with said superintendent at his office at which time she was informed by him that he had nominated her to the said Board as a part of the teaching force and intimated that said Board proposed to drop her, and in view of this information the relator, upon reaching home, wrote to the President of said Board the following letter, which was duly sent through the mails, namely:

3215 FOURTEENTH ST.,
BROOKLAND, D. C., *September* 13, 1906.

Admiral G. W. Baird, President of the Board of Education.

DEAR SIR: Learning today that my name had been crossed from the list of teachers by the Board of Education, I ask as a matter of simple justice that I be permitted to hear the objections or charges that caused me to be dropped from the schools after so many years of faithful service and that I be permitted to defend myself.

13 Will you kindly present this request to the Board of Education? I cannot believe that they fully understand the case, consequently I wish to present it to them if I may be permitted to do so.

Very respectfully,

MARY E. NALLE.

On the fifteenth day of September, the relator received from the Board of Education the following communication:

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA,
FRANKLIN SCHOOL BUILDING,
WASHINGTON, D. C., *Sept.* 14, 1906.

Miss M. E. Nalle, Wash., D. C.

DEAR MADAME: At a recent meeting of the Board, upon the recommendation of the Superintendent, you were dismissed from the public schools of the District of Columbia for the good of the service.

By Order of the Board:

WILLIAM W. CONNOR, *Secretary.*

and on the following day the relator received from said Board a communication, which was as follows:

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA,
FRANKLIN SCHOOL BUILDING,
WASHINGTON, D. C., *September* 15, 1906.

Miss M. E. Nalle, 3215 14th St., Brookland, D. C.

DEAR MISS NALLE: Your request for permission to hear the objection or charges that caused you to be dropped from the schools

was read at the last meeting of the Board, and ordered laid on the table.

By order of the Board:

WILLIAM W. CONNER.

B.

The premises notwithstanding, the relator duly tendered herself ready to continue in the discharge of her duties as a teacher as aforesaid, but by order of the respondents she has been denied and is now denied the right to do so, and the respondents claim and profess that by virtue of the premises the relator has ceased to be a teacher or member of the body of teachers of and in the public schools of the District of Columbia.

Other than aforesaid the relator was never informed by the respondents, said superintendent, or any officer connected with the said Board of Education that she was on trial or being investigated, and the relator has never received any information whatsoever concerning any charges made by any one against her competency as a teacher or her personal purity as a moral woman or any other charges whatsoever that would in any manner unfit her to remain a member of the body of teachers of the public schools of the District of Columbia.

The relator, since receiving from the Board of Education the communication of September fourteenth, has endeavored, in
14 every way possible, to secure information as to what was the basis of the action of said Board in attempting to dismiss her "for the good of the service." The relator did particularly request in a letter directed to the President of said Board on October 1, 1906, that she be informed of the basis of said charges and be given an opportunity to defend herself, which communication was as follows:

3215 FOURTEENTH ST.,
BROOKLAND, D. C., *October* 1, 1906.

Admiral George W. Baird, President of the Board of Education.

DEAR SIR: Over two weeks ago I requested the Board of Education to grant me a hearing in order that the mystery connected with my non-appointment and subsequent dismissal might be cleared up. The request, I learned, was laid on the table and, I suppose, is there yet as I have heard nothing more regarding its disposition. The action of the Board, five members of which do not know me at all, in tabling my request, has resulted in the circulation of exaggerated and unqualifiedly false statements about me, calculated to do untold damage here and in other cities. Such a rare opportunity for the gossips and the scandalmongers as the Board has unwittingly or inconsidera*b*-ly furnished could not possibly be lost, and from all I hear, has been industriously improved.

I have borne with patience the particularly trying position in which I have been placed while awaiting action by the Board. I have not importuned parents or pupils to circulate petitions, I have not attempted to stir up the city in my behalf; but I have trusted to the sense of justice that should be especially strong in those that sit

a judgment upon the destinies of others, and I hoped before this to receive a favorable answer to my request.

I now once more ask you and your associates on the Board to bring me face to face with my accusers and give me an opportunity to answer their accusations.

Very respectfully, MARY E. NALLE.

and did also, through her friends, endeavor to get a hearing *ing;* and in reply to a communication from Mrs. M. V. Lightfoot in that behalf, the said superintendent wrote as follows:

Board of Education of the District of Columbia, Franklin School Building.

William E. Chancellor, Superintendent of Public Instruction.

WASHINGTON, D. C., *November* 16, 1906.

Mrs. M. V. Lightfoot, 1031 17th Street N. W., Washington, D. C.

DEAR MRS. LIGHTFOOT: I find in the last two or three days that there have been a great many suggestions made to the citizens of the District of Columbia, to urge me to reappoint Miss Mary Nalle.

I have no authority to reinstate or reappoint any person. The
15 case of Miss Nalle, as she herself knows, was settled against her contrary to my recommendations. Since that time an incident has occurred for which she says she is not responsible, which makes it impossible for me to nominate her again, at present.

I have not the slightest doubt that she is a remarkably competent teacher.

Very truly yours, WM. E. CHANCELLOR.

C./B.

The relator is advised and therefore avers that the action of said Board in dismissing her is absolutely null and void and of no effect, as same was done contrary to the recommendation of the said superintendent of schools as provided by section two of the aforesaid Act of Congress and in direct violation of and contrary to the letter and the spirit of section ten of the aforesaid Act of Congress wherein it is provided "When a teacher is on trial or being investigated, he or she shall have the right to be attended by counsel and by at least one friend of his or her selection," and the relator is of right and in law still such a teacher and a member of the body of teachers of and in the public schools of the District of Columbia as aforesaid, and as such is entitled to all the rights, dignities, privileges, and emoluments of the said position.

The premises considered the relator therefore prays:

That the writ of mandamus may issue to the respondents and each of them demanding them to restore the relator to her position as a teacher and a member of the body of teachers in the public schools of the District of Columbia as aforesaid and to all the rights, dignities, privileges, and emoluments to the same pertaining as the

same were had and enjoyed by the relator on and prior to the fourteenth of September, nineteen hundred six, aforesaid, and that to that end all necessary orders may be had.

MARY E. NALLE, *Relator.*

RICHARD R. HORNER,
GITTINGS & CHAMBERLIN,
Attorneys for the Relator.

April 19, 1907, Filed. J. R. Young, Clerk.

DISTRICT OF COLUMBIA, *ss:*

Before me, a notary public in and for the District of Columbia aforesaid, personally appeared Mary E. Nalle, who, being by me first duly sworn, deposes and says that she has read the foregoing petition by her subscribed and knows the contents thereof, and that the matters and things therein stated of her own knowledge are true and those stated on information and belief she believes to be true.

MARY E. NALLE.

Subscribed and sworn to before me, this eighteenth day of April, 1907.

[SEAL.] JNO. J. BROSNAN,
Notary Public, D. C.

16 *Rule to Show Cause.*

Issued April 19, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49364.

THE UNITED STATES OF AMERICA on the Relation of MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD et al., Respondents.

Upon consideration of the petition of the above-named relator, in the above entitled cause, it is this 19th day of April, A. D. 1907, ordered, that the respondents, George W. Baird, Oliver M. Atwood, John F. Cook, William V. Cox, Barton W. Evermann, Justina R. Hill, Ellen Spencer Mussey, James F. Oyster, and Mary C. Terrell, and each of them, show cause on Friday, the 3rd day of May, A. D. 1907, why the writ of mandamus should not issue to said respondents requiring them to restore the petitioner to her position as a teacher and a member of the teaching force of the Public School System of the District of Columbia, as in and by the said petition prayed: Provided that a copy of this order be served upon the said respondents on or before the 24th day of April, 1907.

THOS. H. ANDERSON, *Justice.*

Marshal's Return.

Served copy of within order on respondents as follows: George W. Baird, Oliver M. Atwood, John F. Cook, W. V. Cox, Barton W. Evermann, Justina R. Hill, Jas. F. Oyster, Mary C. Terrell, personally, April 19, 1907; Ellen Spencer Mussey, personally April 22, 1907.

AULICK PALMER, *Marshal.*
S.

Filed May 17, 1907. J. R. Young, Clerk.

Answer.

In the Supreme Court of the District of Columbia.

At Law. No. —.

UNITED STATES OF AMERICA ex Rel. MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD et al.

The answer of George W. Baird, Oliver M. Atwood, John F. Cook, William B. Cox, Barton W. Evermann, Justina R. Hill, Ellen
17 Spencer Mussey, James F. Oyster, and Mary C. Terrell to the petition of the above-named relator, states as follows:

1, 2, 3, 4, & 5. They admit the allegations contained in the first, second, third, fourth, and fifth paragraphs of said petition.

6. As to the allegations of the sixth paragraph of the petition, these respondents admit the same in so far as they aver the appointment of the relator as a teacher in the public schools and her continued employment as such teacher for a number of years, and also the averments of the salary received. But as to the allegations toward the bottom of said paragraph 6 beginning with the averment that "on, to wit, July 1, 1906, she (relator) was a member of the teaching force of the Public Schools of the District of Columbia in good standing" etc., these respondents state that they are advised that the same imports a matter of law, and that they are not obliged to make answer unto the same.

7. As to the allegations of the seventh paragraph of the petition touching a certain letter alleged to have been received by the relator from the assistant superintendent of colored schools, and a certain letter written by relator to the superintendent of schools, these respondents say that they are advised and therefore aver, that the same, even if true, are irrelevant, impertinent and immaterial, and in no wise binding on these respondents as the Board of Education. These respondents state that the superintendent of schools is not empowered by law to appoint or dismiss relator or other employees of the school, but that the said power is vested in these respondents as the Board of Education of the District of Columbia;

that the averments of the seventh paragraph are incompetent as in no wise pertaining to these respondents as the Board; and that the said seventh paragraph should thereupon be stricken out and expunged.

8. As to the allegations of the eighth paragraph of the petition these respondents say that the allegation that relator on the 13th day of September, 1906, had another interview with the superintendent of schools, at which time she was informed by him that he had nominated her, is untrue but even if the same were true it is immaterial and in no wise binding on these respondents as the Board, as these respondents are not bound in law to accept or act upon the nominations of the said superintendent. The allegation that the said superintendent "intimated" that the said Board proposed to drop her, relator, and that in view of this information relator wrote to the president of the said Board an alleged letter dated September 13, 1906, is equally irrelevant, immaterial, and incompetent as against these respondents as the Board of Education, as it is alone upon these respondents as the Board of Education that there is devolved by law the power to finally appoint, continue or dismiss the teachers and employees of the public schools of the District of Columbia; and the averments of the said paragraph are hearsay and are not even alleged to bind the Board in any way. These respondents therefore move that the said averments be stricken out and expunged: As to the averments of the said eighth paragraph that on, to wit, the 15th day of September, 1906, the said relator was dismissed from the public schools of the
18 District of Columbia, these respondents say the same is true and will set forth fully hereinafter. The other averment of the said eighth paragraph that the relator had written to the president of the Board of Education requesting that she be permitted to hear the objections or charges that caused her to be dropped from the schools, these respondents say it is true on information and belief, in so far as it is a fact, that she did so inquire and they further admit to be true upon information and belief, that she did receive a communication from the secretary of the Board, dated September 15, 1906, that her request for permission to hear the objections or charges that caused her to be dropped was ordered to be laid upon the table, and that the said communication to relator from the secretary of the Board, answering her communication to the President of the Board as set out in the petition, in which answer of the secretary the exact language of the relator is used, to wit, "permission to hear the objections or charges that caused her to be dropped from the schools" was sent to the relator advising her that her request was laid upon the table because of the fact there were no charges or accusations filed against relator, and it was therefore impossible to comply with her request. The reason of the relator's dismissal will be hereinafter set forth.

The further allegations of the said eighth paragraph to the effect that "other than aforesaid (the letter from the secretary of the Board) the relator was never informed by the re-

spondents, said superintendent or any officer connected with the Board of Education that she was on trial or being investigated" etc., respondents say are hypothetical and have no materiality or bearing in this case, as the said relator was not on trial and was not being investigated. The said allegation of the said petition assumes a fact or condition to exist which has not occurred. The allegation in the said paragraph that the relator on receiving from the Board of Education the communication of the 14th of September as set out in the petition, has endeavored to secure information as to what was the basis of the action of the Board in attempting to dismiss her, is, so far as these respondents are advised, untrue; but if it were true, would be immaterial. These respondents state that the further allegations touching upon the letter to the president of the Board of Education, dated October 1, 1906, alleged to have been written by the relator, are immaterial, incompetent, and impertinent, and should be expunged. The allegation next following, that on November 16, 1906, the superintendent of schools had written to a Mrs. M. V. Lightfoot is doubly immaterial, hearsay and incompetent and in no wise suggesting any connection with these respondents as the Board of Education, nor showing that it proceeded under their authorization or concurrence, and in no wise binds them, and should be stricken out and expunged. The remaining allegations of the said eighth paragraph these respondents state import matters of law, as to which they are advised they are not obliged to make answer.

But further and more fully answering the said petition these respondents say that they were appointed the members of and therefore constitute the Board of Education of the District of
19 Columbia, their said appointments having been made July 3, 1906. Theretofore, Congress had passed an Act approved June 20, 1906, providing for the partial reorganization of the District schools and the creation of a new Board of Education, which these respondents now constitute. At the time of these respondents assuming their duties as the Board of Education they found a large number of teachers including relator, constituting the corps of teachers in the employ of the previous Board of Education now legislated out of existence, and superseded by the new Board which these respondents constitute. These respondents thereupon in meeting as the Board aforesaid, began to provide the schools with teachers for the ensuing school year ending June 30, 1907, and were arranging the continuance in the service of those of the old teachers who were competent and qualified to teach. These respondents found on examination that the relator was not sufficiently qualified in all respects to be competent to continue to teach during the ensuing year, but was deficient in the necessary academic and pedagogic equipment of a competent teacher. These respondents were, therefore, unable lawfully to continue the employment of the relator, and on a meeting of these respondents as the Board of Education on, to wit, September 14, 1906, when the said Board of Education was dealing with the appointment and continuance of the teachers, upon the written recommendation of the superintendent,

the relator was dismissed by the vote of the Board. There was not filed with these respondents as the Board, any charge or accusation against relator, and accordingly said relator was not dismissed because of any charge or any accusation against her being presented to the Board. There could not be, and there was not, any trial or investigation of relator, as there was no charge filed on which to have a trial or investigation, but relator was dismissed purely because of her not being qualified sufficiently to continue as a teacher in the schools. The word "dismissed" was used under the language of the statute but does not indicate in this case anything other than a mere discontinuance of the employment of the relator by the Board because of her deficiency as above set forth. After her dismissal as above set forth these respondents proceeded upon the written recommendation of the superintendent to appoint a teacher in the place thus made vacant and did so appoint a teacher thereto on, to wit, September 14, 1906, and the said teacher has been fulfilling the duties of that position and drawing the salary thereof since the said date. These respondents further aver that the said relator was never charged with any offense or accused so as to be put upon trial or to be under investigation, within the meaning of section 10 of the Act of June 20, 1906.

And having fully answered these respondents pray to be hence dismissed with their costs.

BARTON W. EVERMANN.
ELLEN S. MUSSEY.
JAS. F. OYSTER.
MARY C. TERRELL.
JUSTINA R. HILL.
W. V. COX.

STUART McNAMARA,
Attorney for Respondents.

20 DISTRICT OF COLUMBIA, *ss:*

We do solemnly swear that we have read over the foregoing answer by us subscribed and know the contents thereof; that the matters and facts therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

BARTON W. EVERMANN.
ELLEN S. MUSSEY.
JUSTINA R. HILL.
MARY C. TERRELL.
JAS. F. OYSTER.
W. V. COX.

Filed May 17, 1907. J. R. Young, Clerk.

Demurrer.

In the Supreme Court of the District of Columbia.

At Law. No. 49364.

UNITED STATES OF AMERICA ex rel. MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD et al., Respondents.

The relator, Mary E. Nalle, by and through her attorneys, says that the joint and several answer of the respondents is bad in substance.

GITTINGS & CHAMBERLIN,
RICHARD R. HORNER,
Attorneys for Relator.

Note.

Among the matters of law intended to be argued and relied upon in support of the aforegoing demurrer are the following:

a. That under the last paragraph of section 6 of the Act of Congress approved June 20, 1906, it is expressly provided:

"That no teacher or officer in the service of the public schools of the District of Columbia at the time of the passage of this act shall by the operation of this act be required to take any examination, either mental or physical to be continued in the service."

And if the Board of Education did undertake to make an examination of relator same was without authority of and contrary to law, and is absolutely null and void.

b. That being a teacher in the service of the public schools of the District of Columbia at the time of the passage of the Act of Congress of June 20, 1906, there could be no examination by the Board of Education for the purpose of ascertaining the efficiency of relator except in the manner and form as prescribed by the act, viz: by an an investigation made upon the written recommendation of 21 the Superintendent of schools, which recommendation should be based upon some specific and adequate cause and relator advised of the nature of the charge made against her and an opportunity given her to defend herself in the manner as provided for by section 10 of the act of Congress of June 20, 1906.

c. That said answer does not aver or allege any lawful reason for the removal or dismissal of the relator.

d. That the respondents have not averred in said answer any facts which in law would authorize the dismissal of the relator.

And for other grounds to be shown at the hearing of the demurrer.

GITTINGS & CHAMBERLIN,
RICHARD R. HORNER,
Attorneys for Relator.

Supreme Court of the District of Columbia.

MONDAY, *June 3rd*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

No. 49364. At Law.

UNITED STATES OF AMERICA ex rel. MARY E. NALLE, Petitioner,
vs.
GEORGE W. BAIRD et al., Respondents.

This cause came on to be heard upon the petition, the rule to show cause, the answer of certain of the respondents and the demurrer to said answer, and after argument thereon by attorneys for the respective parties hereto was submitted to the Court for consideration; whereupon it is adjudged and ordered that said demurrer be and is hereby overruled.

The petitioner by her attorney noted an exception to the overruling of said demurrer.

Further, upon motion in open Court, the petitioner is hereby granted leave to file a traverse to the answer herein within five days hereof.

Opinion of Mr. Justice Anderson.

Filed July 13, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49364.

MARY E. NALLE
vs.
GEORGE W. BAIRD et al.

On April 19, 1907, the relator, Mary E. Nalle, filed her petition in this Court praying that the writ of mandamus issue to the
22 respondents and each of them requiring them to restore the relator to her position as a teacher in the public schools of the District of Columbia and to all the rights, privileges, and emoluments to the same pertaining, as the same were enjoyed by her on and prior to September 14, 1903.

Thereupon a rule was laid against the respondents requiring them to show cause, if any they have, why the writ should not issue.

Return to the rule was filed on May 17th, and a demurrer to the return was filed and argued on the same day.

For the purposes of this demurrer, the return of the respondents must be taken as true, at least so far as the same is legally responsive

to relator's petition, the one essential fact being that "these respondents found on examination that the relator was not sufficiently qualified in all respects to be competent to continue to teach but was deficient in the necessary academic and pedagogic equipment of a competent teacher. And at a meeting of these respondents as the Board of Education, on, to wit, September 14th, 1906, upon the written recommendation of the superintendent, the relator was dismissed by the vote of the Board for the good of the service." The return further states, in substance, that no charge or accusation against relator was filed with the respondents as such Board, that she was not dismissed because of any charge or any accusation against her, that "there could not be and there was not any trial or investigation of relator, as there was no charge filed on which to have a trial or investigation, but relator was dismissed because of her not being qualified sufficiently to continue to teach in the schools," and that the place made vacant by her dismissal was, pursuant to the written recommendation of the superintendent, duly filled by the appointment of another teacher on September 14, 1906, and that said teacher has been fulfilling the duties of that position and drawing the salary thereof since that date.

To this return, four grounds of demurrer are assigned, two of which, being general in their character, need not be noticed in this connection. The other two, the first and second, alone present the questions here involved.

The first ground stated is: That under the last paragraph of section 6 of the Act of Congress approved June 20, 1906, any examination of the relator made or attempted to be made by the Board of education was without authority of, and contrary to law, and therefore null and void. The paragraph reads as follows:

"That no teacher or officer in the service of the public schools of the District of Columbia at the time of the passage of this act, shall, by the operation of this act, be required to take any examination, either mental or physical, to be continued in the service."

The second point raised by the demurrer is: That being a teacher in the service of the public schools at the time of the passage of this Act, there could be no examination by the Board of Education for the purpose of ascertaining the efficiency of the relator, except in the manner as provided by Section 10 of this Act, which reads as follows:

"When a teacher is on trial or being investigated, he or she
23 shall have the right to be attended by counsel and by at least one friend of his or her selection."

1. As to the first point raised by the demurrer, it seems clear to the mind of the Court that the paragraph of sec. 6 quoted is not open to the construction put upon it by counsel for the relator. A preceding paragraph of sec. 6 provides that—

"No teacher * * * shall be appointed until he shall have passed an examination prescribed by the Board of Examiners."

So that we have here in this section, first, a provision that all new teachers shall be required to pass the prescribed examination before they can get into the service of the public schools, and, second, a

proviso that those already in at the time of the passage of the Act might be continued in the service without being required to take such examination. There is nothing in the latter paragraph, however, to the effect that teachers not thus required to be examined because already in the service, were to be continued in the service, nor that they could not be required to take an examination, but simply that an examination was not necessary to their continuance in the service, should the Board of Education so determine. It does not mean that, because they were in the service at the time of the passage of the Act. they were thereby "continued in the service," or that the Board could not discontinue them by affirmative action. In the absence of any prohibition in the statute, the power is inherent in the Board to dismiss teachers for want of suitable qualifications as such, as well as to appoint them because they possess such qualifications in the first instance. The power to dismiss teachers, as well as the power to appoint them, falls within the broad and general powers inherent in the Board in the administration of the public schools, as well as under the express authority of section 2 of the act which provides:

"That the control of the public schools of the District of Columbia is hereby vested in a Board of Education to consist of nine members," &c.

So that this paragraph of sec. 6 in question does not affect in any way, the right and power of the Board to inquire or examine into the fitness or qualifications of a teacher, whether in the service at the time of the passage of the Act or subsequently appointed.

The word "examination" in this connection means—to examine or inquire into. Among other definitions of the word given in the Century Dictionary is—"inquiry"—"scrutiny by study or experiment" and scrutiny is defined as "close examination"—"observation." The return or answer to the rule in this case must be construed as meaning, and is admitted by the demurrer to mean that upon examination, that is, upon observation and inquiry, into the qualifications and competency of this relator in her capacity as a teacher, they found her to be "deficient in the necessary academic and pedagogic equipment of a competent teacher," and that, in the exercise of their duty, as well as their authority as they regarded it, they dismissed her for the good of the service, and not because any charge had been preferred against her or that she was guilty of any act of omission preferred against her or that she was guilty of any act of ommission or commission that would have justifieed the preferring of an accusation or charge against her requiring a a trial or investigation.

2. The second point of the demurrer as already stated is that, even if the Board of Education had the right under the law to examine into the competency of the relator as a teacher, they could not legally do so, except under the provisions of sec. 10 of the Act, and that, not having so proceeded, their dismissal of the relator is null and void.

As already stated, the demurrer admits that no accusation or charge was laid against the relator, and that her dismissal was with-

out formal investigation or trial. It seems to me that the mere statement of this situation of the case is sufficient to show that it does not come within the provisions of sec. 10 of the Act. Under the provisions of that section it is only where a teacher is on trial or being investigated that the right is given him to be present and attended by counsel and a friend of his own selection. This section must receive a sensible construction—such a construction as will effectuate the legislative intention so as to avoid, if possible, an unjust or absurd conclusion. If Congress had intended that no teacher could be dismissed from the service except after a trial or investigation where such teacher had had an opportunity to be present and to be attended by counsel and a friend, it would have been an easy matter to have so provided in sec. 10, and from the very fact that it did not do so, it may well be inferred that it purposely omitted such provision therefrom, and especially as sec. 2 provides just how teachers shall be removed, namely,

"No dismissal of any teacher shall be made by the Board of Education except upon the written recommendation of the Superintendent of Schools."

The general power of the Board to dismiss a teacher in a proper case is here expressly conferred, subject to the one condition that such dismissal shall be "upon the written recommendation of the Superintendent of Schools." Congress thus clearly differentiates between the right of the Board of Education to dismiss a teacher, as in this case, where no accusation or charge is lodged against the teacher involving acts of misconduct and the like, either of omission or commission, and a case where misconduct is charged against a teacher, which in its very nature entitles the teacher to a trial before he or she could in justice be dismissed from the service of the public schools. Unlike the Cardozo case, the case at bar does not fall within the scope of the latter, but comes strictly within the former.

It was argued upon the hearing that the Cardozo case was decisive of the case at bar. This view was based upon a clear misapprehension of the former case. There Cardozo was charged with writing a certain anonymous letter and also with having admitted frequent acts of disloyalty to his superior, the assistant superintendent of colored schools. Whether the Board of Education had the power to dismiss Cardozo from his position of supervising principal in the manner in which they did, involved the consideration of two propositions—

(1) Whether Cardozo at the time of his dismissal was a teacher within the meaning of sec. 10 of the Act of June 20, 1906, and

(2) Whether, if a teacher, he was accorded a trial within the meaning of that statute.

And the court found, under the undisputed testimony in the case that while Cardozo was denominated a supervising principal and held that office, his duties mainly were those of a teacher, and that he was a teacher in the contemplation of sec. 10 of the Act, and that, being such teacher, and charges having been lodged against him of such character as entitled him to all the rights and privileges

provided for in sec. 10 of the Act, and the Board having denied to him such right, the writ of mandamus should issue.

But we have no such case here. So far as the relator is concerned, it is admitted by the demurrer that she was dismissed by the Board of Education upon the written recommendation of the Superintendent, simply because she was lacking in the academic and pedagogic equipment of a competent teacher and for no other reason; and the action of the Board in so doing, in the absence of any accusation or charge against her of the character contemplated by sec. 10 of the Act, was clearly within its powers as defined by the Act; and therefore the Court is as much bound by the action of the Board of Education as the relator herself, even though the Board was mistaken as to the lack of equipment upon the part of the relator, as to which this court has nothing to do.

That Congress never intended to tie the hands of the Board of Education so that it could not dismiss a teacher who was found to be lacking in the necessary qualifications of a competent teacher, is not only evident from the Act itself, but in the very nature of things it must be so. If a teacher could not be removed in this and kindred cases except by a formal trial or investigation, then the conferring of "the control of the public schools of the District of Columbia" upon the Board of Education, and the right in a proper case to dismiss teachers upon the written recommendation of the Superintendent of Schools, would be a meaningless and absurd thing. I can conceive no greater calamity that could befall the public schools of this city, or of any other community, than to place them under a law whereby incompetent teachers could not in any case be removed or dismissed without formal trial, with all the annoying and vexatious incidents attendant thereon. The disastrous consequences of such a construction of sec. 10 of this Act cannot be overestimated, and no such construction should be given the statute unless its language made it the imperative duty of the Court so to do.

That Congress never so intended is not only clear, as it seems to me, from the language of the Act itself, but from the further fact that Congress at its last session refused to amend section 10 so as to provide that no teacher could be dismissed for any reason except after trial, thus indicating the purpose of Congress in passing the original Act.

For the reasons stated, the demurrer will be overruled.

THŌS. H. ANDERSON, *Justice.*

May 31, 1907.

26 Filed June 7, 1907. John R. Young, Clerk.

Relator's Traverse of Respondents' Answer to Rule.

In the Supreme Court of the District of Columbia.

At Law. No. 49364.

UNITED STATES OF AMERICA ex Rel. MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD et al., Respondents.

Comes now the relator by her attorneys and traverses and denies each of the allegations in the answer of the respondents herein, which are hereinafter set forth, and prays that same may be inquired of, according to the form of the Statute in such case made and provided, namely:

1. The allegation in the sixth paragraph of said answer that, "the relator was not a member of the teaching force of the public schools of the District of Columbia in good standing on July 1, 1906."

2. The allegation in the eighth paragraph of the said answer, that, "it is untrue that the relator on the 13th day of September, 1906, had another interview with the Superintendent of Schools at which time she was informed that he had nominated her."

3. The allegation in paragraph eight of said answer, that, "the relator was advised that her communication of September 15, 1906, to the Board of Education had been laid upon the table because no charges or accusations had been filed against her, and therefore it was impossible for them to comply with her request."

4. The allegation, that, "these respondents found on examination that the relator was not sufficiently qualified in all respects to be competent to teach during the ensuing year, but was deficient in the necessary academic and pedagogic equipment of a competent teacher."

5. The allegation in the eighth paragraph of said answer, that, "at a meeting of these respondents, as the Board of Education, on, to wit, September 14, 1906, when the said Board of Education was dealing with the appointment and continuance of teachers, upon the written recommendation of the Superintendent, the relator was dismissed by a vote of the Board."

6. The allegation in the eighth paragraph of said answer, that, "there was not filed with the respondents as the Board, any charge or accusation against the relator, and accordingly said relator was not dismissed because of any charge or any accusation against her being presented to the Board."

7. The allegation in the eighth paragraph, that, "there could not be and there was not any trial or investigation of relator, as there was no charge filed on which to have a trial or investigation, but relator was dismissed purely because of her not being qualified sufficiently to continue to teach in the schools."

8. The allegation in the eighth paragraph of said answer,
27 that, "after her (relator's) dismissal respondents proceeded upon the written recommendation of the Superintendent to appoint a teacher in the place thus made vacant, and did so appoint a teacher thereto on, to wit, September 14, 1906, and the said teacher has been fulfilling the duties of that position and drawing the salary thereof since that date."

9. The allegation in the eighth paragraph of said answer, that, "said relator was never charged with any offense or accused so as to be put upon trial or to be under investigation, within the meaning of section 10 of the Act of June 20, 1906."

GITTINGS & CHAMBERLIN,
R. R. HORNER,
Attorneys for Relator.

Motion to Strike Out, &c.

Filed June 19, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49364.

UNITED STATES OF AMERICA ex Rel. MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD et al., Respondents.

Now come the respondents and move the Court to strike out the first, second, third, sixth, and ninth grounds assigned by the traverse of the relator filed herein because the same and all of them are traverses of immaterial and irrelevant matter and purports to traverse matter of law, and other matters, not raising any proper or material issue herein.

STUART McNAMARA,
Attorney for Respondents.

Joinder of Issue.

Filed June 19, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49364.

UNITED STATES OF AMERICA ex Rel. MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD et al., Respondents.

Come now the respondents and join issue upon the traverse of the relator filed herein, as to its fourth, fifth, seventh and eighth grounds assigned.

STUART McNAMARA,
Attorney for Respondents.

28 Supreme Court of the District of Columbia.

WEDNESDAY, *June 19th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

No. 49364. At Law.

UNITED STATES OF AMERICA ex Rel. MARY E. NALLE, Pet'r,
vs.
GEORGE W. BAIRD et al., Respondents.

Upon consideration of respondents' motion filed herein, to strike out the 1st, 2nd, 3rd, 6th, and 9th grounds assigned by traverse of relator filed herein, it is ordered that said motion be, and is hereby granted.

Thereupon, this cause comes on to be heard, upon the petition filed herein, the rule to show cause issued thereon, the return of respondents to the Rule, the Traverse of relator to such return and the joinder in issue on the traverse, and after hearing testimony submitted by petitioner and arguments of counsel, it is ordered that the writ of mandamus prayed for, be, and is hereby denied, the rule to show cause hereby discharged, and the petition dismissed at the costs of petitioner.

Order for Appeal.

Filed June 27, 1907.

In the Supreme Court of the District of Columbia, the 26th day of June, 1907.

At Law. No. 49364.

THE UNITED STATES OF AMERICA on Relation of MARY E. NALLE
vs.
GEO. W. BAIRD et al.

The Clerk of said Court will note the appeal of the petitioner herein from the judgment entered on the 19th of June 1907 to the Court of Appeals of the D. C.

GITTINGS & CHAMBERLIN,
R. R. HORNER,
Attorneys for Petitioner.

June 26, 1907.

Citation waived:

STUART McNAMARA,
Attorney for Respondents.

29 UNITED STATES OF AMERICA, MARY E. NALLE, Plaintiff,
vs.
GEORGE W. BAIRD et al., Def't.

The Court having this day signed the Bill of Exceptions heretofore submitted herein, orders that the same be now made of record as of the time of the noting thereof at the trial.

Bill of Exceptions.

Filed January 13, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49364.

UNITED STATES OF AMERICA ex Rel. MARY E. NALLE, Relator,
vs.
GEORGE W. BAIRD et al., Respondents.

Be it remembered that this case came on for further hearing on June 17, 1907, before Circuit Court No. 2, Mr. Justice Anderson presiding, whereupon counsel for the relator moved the Court to quash the paper filed in this cause as an answer and return to the petition and rule to show cause and grant the relief as prayed for in the relator's petition, among others as ground therefor that same was insufficient in law as said paper on its face purports to be the answer of the entire Board of Education when in fact it had only been signed by William V. Cox, Barton W. Evermann, Justina R. Hill, Ellen Spencer Mussey, James F. Oyster, and Mary C. Terrell. The Court overruled said motion, to which action of the Court the relator then and there noted an exception which was duly entered by the Court upon its minutes.

In order to maintain the issues on her part joined, the relator then offered as a witness JOHN F. COOK, Esq., who, after being duly sworn, testified as follows:

30 That he is a member of the Board of Education of the District of Columbia, receiving his appointment as such on July 3, 1906; that he is very well acquainted with the relator and has known her as a public school teacher for the past thirty-two years; that he was present at all meetings of the Board of Education up to and including that of September 14, 1906; that at none of said meetings were the qualifications of Miss Nalle discussed at any time; and that further he had never heard any member of the Board of Education discuss with any other member or with any one else Miss Nalle's qualifications from an academic or pedagogic point of view nor was there any recommendation made by Doctor Chancellor for relator's dismissal based upon her want of academic and pedagogic equipment nor did the Board at any time appoint a committee to

examine into her qualifications as a public school teacher. She was dismissed upon the written recommendation of the superintendent. The answer to the rule was never submitted to witness for his signature; and no reason was ever assigned for Miss Nalle's removal in his presence.

Doctor OLIVER M. ATWOOD, being first duly sworn, testified as follows:

That he is a member of the Board of Education, receiving his appointment July 3, 1906; that from the first meeting of the Board up to the time he was taken sick in January or February, 1907, he was personally present at all meetings of said Board and at none of said meeting does he recall having heard Miss Nalle's qualifications as a teacher discussed; he is positive that he never heard any member of the Board of Education discuss her qualifications from an academic and pedagogic standpoint; that he has known Miss Nalle as a public school teacher for the past twenty years and in that time has never heard any one suggest that she was not thoroughly competent; no committee, to his knowledge, was ever appointed by the Board of Education or any one else to examine into the qualifications or fitness of Miss Nalle as a public school teacher; that he is a member of the committee on high and normal schools and that committee made no report upon the case of Miss Nalle to the Board of Education or to any one else. He did not sign the answer although it was submitted to him. His reason for not signing the same was that the grounds alleged in the answer had never before been heard of by him.

On cross-examination witness testified that the answer was presented to him for his signature by the Notary while he was sick at home and that as he had no knowledge of the facts contained in the answer, he declined to sign it until he had consulted with the att'y for the Board.

WILLIAM M. CONNOR, witness on behalf of the relator, being duly sworn, testified as follows:

That he was the secretary of the Board of Education in September, 1906, and has with him the minutes of the Board of Education (being asked to examine the minutes to ascertain whether Doc-
31 tor Atwood and Mr. John F. Cook were present at a meeting of the Board on September 14, 1906, he stated that they were present at that meeting according to the minutes of the meeting held by the Board of Education on September 14, 1906); he stated that according to the minutes of that meeting Miss Nalle was dismissed for the good of the service upon the written recommendation of the superintendent; and that said minutes do not show that any teacher was appointed in Miss Nalle's place. It was conceded by counsel that after relator's dismissal another teacher was appointed by the Board.

Whereupon relator offered the following letter:

Board of Education of the District of Columbia, Franklin School Building.

William E. Chancellor, Superintendent of Public Instruction.

WASHINGTON, D. C., *November* 16, 1906.

Mrs. M. V. Lightfoot, 1031 17th Street, N. W., Washington, D. C.

DEAR MRS. LIGHTFOOT: I find in the last two or three days that there have been a great many suggestions made to the citizens of the District of Columbia, to urge me to reappoint Miss Mary Nalle. I have no authority to reinstate or reappoint any person. The case of Miss Nalle, as she herself knows, was settled against her contrary to my recommendations. Since that time an incident has occurred for which she says she is not responsible, which makes it impossble for me to nominate her again, at present.

I have not the slightest doubt that she is a remarkably competent teacher.

Very truly yours, WM. E. CHANCELLOR.

C./B.

To which letter counsel for the respondents objected. Counsel for the relator stated that the ground upon which it was offered was for the purpose of showing that the recommendation for Miss Nalle's dismissal had nothing whatever to do with her academic and pedagogic qualifications as a teacher.

The Court sustained the objection, to which ruling the relator duly reserved her exception which the Court then and there noted upon its minutes. The relator then offered in evidence the following letter:

Board of Education of the District of Columbia, Franklin School Building.

William E. Chancellor, Superintendent of Public Instruction.

WASHINGTON, D. C., *Sept.* 17, 1906.

DEAR DR. VAN SICKLE: Miss M. E. Nalle of this city has had always an excellent record as a teacher. She has fine and thorough scholarship and good control in her classes. For reasons
32 chiefly legal and under circumstances that I shall be glad to explain to you personally, she is no longer in the service of these schools, but I should be very glad, indeed, to have her in my corps anywhere else.

Very respectfully, WM. E. CHANCELLOR.

Counsel for the respondents objecting, counsel for the relator stated to the Court that he offered this letter upon the same ground as that of the letter to Mrs. Lightfoot. The Court sustained the ob-

jection, to which ruling the relator reserved her exception which was then and there noted upon the Court's minutes.

Whereupon counsel for the relator offered the following letter:

William E. Chancellor, Superintendant of Public Instruction, District of Columbia.

OFFICE FRANKLIN SCHOOL BUILDING,
WASHINGTON, D. C., *March 26th*, 1907.

Dr. Richard Kingsman, 711 East Capitol Street, Washington, D. C.

MY DEAR DR. KINGSMAN: Thank you very much for your letter. The objections to Miss Nalle are not in relation to her character, but to her reputation.

Under the present law, she cannot be appointed without going through the Board of Examiners.

Respectfully yours, WM. E. CHANCELLOR.

Counsel for the respondents objecting, counsel for the relator stated that he offered this letter upon the same ground as that of former letters. The Court sustained the objection, to which ruling the relator duly reserved her exception which the Court then and there noted upon its minutes.

Whereupon counsel for the relator offered in evidence the following letter:

Board of Education of the District of Columbia, Franklin School Building.

William E. Chancellor, Superintendent of Public Instruction.

WASHINGTON, D. C., *December* 15, 1906.

Mr. L. H. Thompson, Hurst Place, W. Washington, D. C.

DEAR SIR: You do not seem aware of the fact that I have already nominated Miss Nalle and that she was defeated, and that my responsibility has ceased.

Very truly yours, WM. E. CHANCELLOR,
(Per B.)

C./B.

Counsel for the respondents objecting, counsel for the relator stated that his offer was based upon identically the same
33 ground as that of the other letters. The Court sustained the objection, to which ruling the relator duly reserved her exception which was then and there entered by the Court upon its minutes. Whereupon counsel for the relator offered the following letters:

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA,
FRANKLIN SCHOOL BUILDING,
WASHINGTON, D. C., *Sept.* 14, 1906.

Miss M. E. Nalle, Wash., D. C.

DEAR MADAME: At a recent meeting of the Board, upon the recommendation of the Superintendent, you were dismissed from

the public schools of the District of Columbia for the good of the service.

By Order of the Board:

WILLIAM W. CONNER, *Secretary.*

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA,
FRANKLIN SCHOOL BUILDING,
WASHINGTON, D. C., *September* 15, 1906.

Miss M. E. Nalle, 3215 14th St., Brookland, D. C.

DEAR MISS NALLE: Your request for permission to hear the objection or charges that caused you to be dropped from the schools was read at the last meeting of the Board, and ordered laid on the table.

By order of the Board:

WILLIAM W. CONNER.

which were admitted in evidence.

Dr. CHANCELLOR being called as a witness on behalf of the relator after being duly sworn testified as follows:—

He attended all meetings of the Board of Education in September, 1906; was present at the meeting held by the Board of Education September 14, 1906, when Miss Nalle was dismissed; recalled no discussion at that meeting of Miss Nalle's qualifications, academic or pedagogic. He further testified that at a meeting a few days before the 14th at which he remembers all of the members were present, her fitness for the public schools was discussed—that they did not discuss this feature, or that and the other, but they did discuss generally relator's fitness for continuation in the service, and that he knows that it was the concensus of opinion, or in other words, he understood that it was the opinion of the board, or of substantially the entire board that she ought to be dismissed from the service because she was not qualified to continue as a teacher and witness wholly understood that members of the Board at that conference were talking as members of the board; whereupon he made his written recommendation that she be dismissed for the good of the service and the board acted upon that.

Whereupon counsel for the relator stated that they would rest at this point and offered no other evidence.

34 Whereupon counsel for the respondents moved the court for a judgment on the ground that the evidence showed that relator had been dismissed under the authority of the law; after argument by counsel for relator and respondents the court stated as follows:

"There is some language in this return that seems to be regarded by the relator as altogether controlling in this matter. It is true that the answer does say that upon examination the Board of Education found that the relator did not have the necessary qualifications of a competent teacher, academically and pedagogically. It is stated in several forms as I remember. One was quoted a while ago. One

allegation was that she was removed becaue not qualified as a teacher in the schools. Suppose nothing else had been said in this answer but that. Suppose nothing had been said about 'examination.' Having used it the term must be given a reasonable construction, it must be construed in the light of the statute. It does not mean that the Board did a thing that they were not required to do. The 'examination' must have been such an examination as I find I defined when I disposed of the other branch of this case—that is that they ascertained upon examination and in inquiry into the qualifications of the relator in her capacity as a teacher that she was deficient in the necessary qualifications of a competent teacher.

"Now it was not necessay that the Board should find that she was lacking in the academic and pedagogic equipment of a competent teacher, if they found generally that she was not qualified to teach in the public schools; and that is one of the averments in the answer or return. It does not follow that because every averment of the answer or return has not been sustained by the evidence in its every letter, that therefore the writ should issue in this case. The foundation of this whole proceeding is found in the second paragraph of the second section of the Act, which says,

'No appointment, promotion, transfer, or dismissal of any * * * teacher * * * shall be made by the Board of Education, except upon the written recommendation of the Superintendent of Schools.'

Now there are just two things required by the statute.

First that before the Board can act, the superintendent must act; and his action must be in the nature of a recommendation, and that recommendation must be in writing. When that recommendation is filed before the Board they may vote it up or may vote it down. The responsibility of the Superintendent ends with the filing of that recommendation. In this case he recommended that the relator be removed for the good of the service. Not because she was lacking in her academic or pedagogic equipment, but simply because that she be dismissed from the public schools for the good of the service; and the Board acting upon that recommendation dismissed her.

"Now what is the history of the matter as the testimony now stands. Mr. Cook says that as he remembers it he was present at all of the meetings of the Board and he did not hear the relator's equipment in these two respects discussed. Together with that fact he did not hear anything but words of the highest commenda-
35 tion of this teacher. Now Dr. Chancellor testifies that at a meeting a few days before at which as he remembers nearly all of the members were present including Mr. Cook, her equipment—her fitness for the public schools, if you please—was discussed—that they did not discuss this feature, and that and the other, but that they did discuss generally the relator's fitness for continuation in the service, and that he knows that it was the concensus of opinion, or in other words he understood that it was the opinion of the Board or of substantially the entire Board, that she ought to be dismissed from the service because she was not qualified to continue as a teacher. Now that is what took place. If there had been charges filed against the relator, and they had been suppressed, and

then the Board had proceeded to oust her or dismiss her upon an entirely different ground, this Court would not tolerate a subterfuge of that kind for a moment. But there was a conference here of all the members of the Board in which her equipment or the advisability of continuing her in the schools because of the same was considered, and it was the opinion of all or substantially all of the members of the Board that she was not qualified to continue as a teacher. Dr. Chancellor testifies that he wholly understood the members of the Board at that conference, and they were talking as members of the Board. Thereupon he made this recommendation that she be dismissed for the good of the service, and the Board acted upon that. Now this court cannot sit here as a court of error, a court to review any errors committed by the Board of Education. The only thing I can determine here is whether they have gotten beyond their jurisdiction. They have acted within their jurisdiction, this court is bound by it, and has no jurisdiction to issue any writ so long as they acted within their jurisdiction.

"The main purpose of a mandamus is to put something in motion, it is not for the purpose of reviewing any errors that may have been made by the Board of Education, but its purpose is to compel them to do something that they are bound to do. Now are they bound to put this lady back as a teacher? If so, it must be because they have exceeded their jurisdiction; but they have kept strictly within the letter of the Statute, as I understand it—the Statute has provided that no teacher shall be removed except upon the written recommendation of the Superintendent. That recommendation has been made. It was made after a conference of the members of the Board of Education sitting as a committee of the whole, as Dr. Chancellor expressed it, at which meeting they reached the conclusion that she was not qualified to continue as a teacher, and thereupon, he made his recommendation and they acted upon it. Now having kept thus within the requirements of the Statute, I do not think that this Court, upon this testimony, will be justified in issuing the writ, and therefore it will be denied."

To which action the relator duly noted her exception, which exception the Court then and there entered upon its minutes. Whereupon on June 19, 1907, upon the minutes of said Court was entered the following judgment:

36 JUNE 19, 1907.

Upon consideration of respondent's motion filed herein to strike out the 1st, 2nd, 3rd, 6th, and 9th grounds assigned by traverse of relator filed herein, it is ordered that said motion be, and it is hereby granted.

Thereupon this cause comes on to be heard upon the petition filed herein, the rule to show cause issued thereon the return of the respondents to the Rule, the Traverse of relator to such return and the joinder in issue on the traverse, and after hearing testimony submitted by petitioner and arguments of counsel it is ordered that the writ of mandamus prayed for be, and is hereby denied, the rule to show cause hereby discharged, and the petition dismissed at the cost of petitioner.

To the entering of which the relator duly noted her exception, which exception was then and there entered by the Court upon its minutes.

The foregoing exceptions were taken by the relator and were duly noted by the presiding justice on his minutes prior to the entering of his judgment.

To the end that justice may be attained in the premises and that the questions raised by the foregoing exceptions may be reviewed and determined on appeal, the relator prays the Court to sign this her bill of exceptions of and for the time the same were noted; which is accordingly done now for then this 13 day of Jan'y 1908.

THOS. H. ANDERSON, *Justice.*

37 *Demurrer to Defendants' First Plea to Second Count.*

Filed Jan. 21, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 50569.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER et al.

Now comes the plaintiff, by and through her attorneys and says that the first joint and several pleas of the defendants to the second count of the amended declaration is bad in substance.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Among the matters of law intended to be argued and relied upon in support of the foregoing demurrer to the first plea is the following:

That the record set out as an exhibit to said plea shows on its face that said suit is not the same identical cause of action and did not necessarily involve the subject matter of this cause of action and judgment therein did not in any way affect the subject matter of the present cause of action, all of which appears upon the face of said record.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Demurrer to Second Plea to Second Count.

Filed Jan. 21, 1910.

In the Supreme Court of the District of Columbia.

* * * * * * *

Now comes the plaintiff, by and through her attorneys and says that the joint and several plea of defendants to the second count of the amended declaration is bad in substance.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Among the points of law to be argued as ground for demurrer to the second plea to the second count of the amended declaration are the following:

a. That it does not appear from said plea that the publication therein set out was privileged.

b. That false and malicious statements complained of were not material, relevant, pertinent and necessarily involved in the mandamus proceedings, known as Law cause 49604.

38 *c.* That the doctrine of privilege has no application in law as a defense to an action on a case in the nature of a common law conspiracy.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

In the Supreme Court of the District of Columbia.

FRIDAY, *January* 21, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

At Law. No. 50569.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN, Defendants.

Now comes on for hearing the motion of plaintiff filed herein this 21st day of January 1910, by her attorneys Messrs. Gittings & Chamberlin, to strike out the first and second joint and several pleas of the defendants, whereupon, the plaintiff by her said attorneys in open court withdraws said motion.

Thereupon, comes on for hearing the demurrers filed herein this

21st day of January, to the first joint and several plea and to the second joint and several plea of defendants.

Upon consideration whereof it is ordered that said demurrers be and are hereby severally overruled. Thereupon the plaintiff electing to stand upon the pleadings now in this cause it is considered that the plaintiff herein, take nothing by this action, that said defendants go hereof without day, be for nothing held and recover of plaintiff their costs of defense to be taxed by the Clerk, and have execution thereof.

Whereupon plaintiff by her said attorneys in open court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of a bond for costs is fixed in the sum of One Hundred Dollars.

Memorandum.

January 25, 1910.—Appeal bond approved and filed.

39 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Jan. 25, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 50569.

MARY E. NALLE, Plaintiff,
vs.
JAMES F. OYSTER et al.

The Clerk will please make up the record to the Court of Appeals in the above entitled cause and include therein the following:

Original Declaration,
Amended declaration and demurrer thereto,
Order sustaining demurrer to first count and overruling it as to second count,
Defendants' pleas to the amended declaration,
Plaintiff's demurrers to said pleas,
Order overruling demurrers,
Appeal therefrom,
Bond.

GITTINGS & CHAMBERLIN,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to

36, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50569 at Law, wherein Mary E. Nalle is Plaintiff and James F. Oyster, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of March, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2130. Mary E. Nalle, appellant, vs. James F. Oyster et al. Court of Appeals, District of Columbia. Filed Mar. 4, 1910. Henry W. Hodges, clerk.

40 WEDNESDAY, *October 12th, A. D.* 1910.

No. 2130.

MARY E. NALLE, Appellant,
vs.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN.

The argument in the above entitled cause was commenced by Mr. J. C. Gittings, attorney for the appellant, and was continued by Mr. R. S. Huidekoper, attorney for the appellees.

THURSDAY, *October 13th, A. D.* 1910.

No. 2130.

MARY E. NALLE, Appellant,
vs.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN.

The argument in the above entitled cause was continued by Mr. R. S. Huidekoper, attorney for the appellees, and was concluded by Mr. J. C. Gittings, attorney for the appellant.

41 No. 2130.

MARY E. NALLE, Appellant,
vs.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This is a suit brought by appellant in the Supreme Court of the District of Columbia for the recovery of damages arising from the alleged publication of a libel by the appellees. The action arises out of a former suit in the Supreme Court of the District in which the appellant brought an action for a writ of mandamus to require the appellees, as the school board of the District of Columbia, to reinstate her as a school teacher in the public schools. For convenience the appellant and appellees will be referred to as plaintiff and defendants in the relation they sustained in the present action, as well as in the former, in the court below.

The amended declaration filed in the present case contained two counts; to the sufficiency of which counsel for defendants demurred. The demurrer was sustained as to the first count, and defendants were required to plead to the second count. No exception was taken by counsel for plaintiff to the ruling of the court in sustaining the demurrer to the first count. We can, therefore, confine ourselves to the allegations of the second count. Plaintiff, in the second count, alleges, in substance, that prior to September 14, 1906, she had been for many years a teacher in the public schools of the District of Columbia; that, without notice, defendants, acting as a board, dismissed her from the rolls as a teacher, "assigning therefor that the same was done for the good of the service;" that thereupon plaintiff filed her petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the board to reinstate her in her position as teacher; that the board composed of the defendants, in order to prevent her from securing a writ, entered "into an unlawful agreement, combination, confederation, and conspiracy among themselves to ruin plaintiff, and to specifically prevent her from obtaining her proper redress as prayed for, and to which she was entitled in the mandamus proceeding aforesaid, and to cause it to be believed by the public in general that she was deficient in the necessary academic and pedagogic equipment of a competent teacher, and thereby prevent her from securing employment as a school teacher. In pursuance to their aforesaid plan and conspiracy to injure and ruin the plaintiff, the defendants maliciously and unjustly composed and published and caused to be composed and published, and filed, and caused to be filed in the clerk's office of the Supreme Court of the District of Columbia, a certain paper purporting to be in their answer, and the answer of other members of the Board of Education, which contained certain false and scandalous and

defamatory libel of and concerning plaintiff, and of and concerning her in and about her profession as a school teacher, in the false and malicious and libelous words following: 'These respondents (meaning the defendants and others composing the Board of Education of the District of Columbia) found on examination that the relator (meaning the plaintiff) was not sufficiently qualified in all respects to be competent to continue to teach during the ensuing year (meaning to continue to teach in the public schools of the District of Columbia for the school year of 1906-1907), but was deficient in the necessary academic and pedagogic equipment of a competent teacher. These respondents (meaning defendants and others composing the Board of Education of the District of Columbia) were, therefore, unable lawfully to continue the employment of the relator (meaning plaintiff).'"

The declaration further alleges that the defendants neither individually nor as a board examined plaintiff as to her qualifications for a teacher, and that defendants knew at the time of filing the answer "that plaintiff was thoroughly proficient, both pedagogically and academically, and was so recognized by all who knew her both in and out of the schools; and the defendants, and each of them, knew at the time of the composition and publication of the aforesaid false, scandalous and defamatory libel that the facts therein alleged were absolutely false in fact and done and intended to be done as and for a mere subterfuge, all of which was done in pursuance of their aforesaid unlawful agreement and design to annoy, disturb, hinder, interfere with, oppress and injure plaintiff in her aforesaid pursuit." Then follows the allegation as to damage.

For answer the defendants admit that plaintiff had been a teacher in the schools prior to September 14, 1906, and allege that, under the authority vested in them as the Board of Education of the District of Columbia, plaintiff was dismissed from the service. They set up the proceedings had in the former action brought by the plaintiff to secure a writ of mandamus to compel defendants to restore her to her position as a teacher, and allege that, "as respondents in said action of mandamus, filed an answer in the Supreme
42 Court of the District of Columbia, in said suit, and in and by said answer, and upon a matter material, relevant, pertinent, and necessarily involved in said cause and litigated therein between the said parties, set up the identical matters and writings complained of in the present suit and thereupon set up in said answer and as a response to the allegations of said petition" the identical paragraph from the answer in the mandamus proceeding which is above set out in the declaration as composing the libel upon which this action is based. Defendants further allege the entry of a final judgment in their favor in the mandamus proceeding, and plead former adjudication. A demurrer to the answer was interposed, which was overruled. The plaintiff elected to stand upon her demurrer, and judgment was entered for the defendants. From this order the cause comes here on appeal.

In stating the case presented by the pleadings we have ignored the question of privileged communication, for the reason that the

judgment can be sustained upon the plea of former adjudication. The conclusiveness of the judgment in a prior suit between the same parties must be ascertained from the record in that case or by extrinsic evidence that the question involved in the present action was raised and determined in the former case. It is not denied that the matter here complained of was involved in the former suit. In fact, its existence there forms the basis of this action. But it is contended that the present suit is a different cause of action from the former one, and that the alleged conspiracy was not complete, and the overt act here complained of had not been committed, until after the former suit was instituted. The mere fact that a different cause of action is involved, so long as the same parties are concerned, will not prevent the plea of estoppel. The rule was announced in Southern Pacific R. R. Co. v. United States, 168 U. S., 1, as follows: "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

Neither is it important that the alleged libel was not in existence at the time of the filing of the former suit. If it was involved in the mandamus proceeding, and its determination was an essential element of the judgment, plaintiff can not make it the basis of an action for libel. We understand the rule of res judicata to be that a judgment or decree rendered by a court of competent jurisdiction is conclusive not only upon all matters directly involved in the issue under consideration, but upon all matters properly put in litigation or that could have been adjudicated therein. "The plea of res judicata applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Beloit v. Morgan, 7 Wall., 619. The alleged libel, forming the basis of the present suit, not only could properly have been determined in the mandamus proceeding, but clearly was determined and formed a material issue in arriving at the judgment therein.

While the opinion of the trial court is not part of the record in that case, we may look to it to ascertain what was in the mind of the court when the judgment was rendered. In considering the portion of the answer here involved, which constituted the chief defense of the defendants in that action, the learned justice said: "In the absence of any prohibition in the statute, the power is inherent in the board to dismiss teachers for want of suitable qualifications as such. * * * The return or answer to the rule in this case must be considered as meaning and is admitted by the demurrer to mean that upon examination—that is, upon observation and inquiry into the qualifications and competency of this relator in her capacity as

teacher—they found her to be 'deficient in the necessary academic and pedagogic equipment of a competent teacher,' and that in the exercise of their duty as well as their authority, as they regarded it, they dismissed her for the good of the service. * * * The general power of the board to dismiss a teacher in a proper case is expressly conferred, subject to one condition, that such dismissal shall be 'upon written recommendation of the superintendent of schools.' * * * That Congress never intended to tie the hands of the Board of Education so that it could not dismiss a teacher who was found to be lacking in the necessary qualifications of a competent teacher, is not only evidenced by the act itself, but in the very nature of things it must be so."

This court, in affirming the judgment, United States ex rel. Nalle v. Hoover et al., 31 App. D. C., 311, said: "The answer of the respondents sets forth that relator was dismissed because she was lacking in the academic and pedagogic equipment of a competent teacher. * * * If the board had power to dismiss relator upon the recommendation of the superintendent of schools, without granting her such a hearing as is provided for in section 10 of the act, we will not stop to inquire into the method employed by the board in arriving at its decision."

It will be observed that the judgment of the court below and the opinion of this court rest upon the fact that the board had found the plaintiff deficient in the necessary qualifications of a teacher, and that the examination mentioned in the statute required no formal hearing; but might consist of any information the members of the board might gather, individually or collectively, that would, in their judgment, justify her dismissal. It will also be observed that the allegations of the answer involved formed the very basis of the judgment dismissing the mandamus proceeding. It was the duty of the defendants (the board in that case) to state in their answer why they had dismissed the plaintiff, and it was upon this allegation and the proof adduced at the trial that the writ was denied.

We are, therefore, of the opinion that the main question of fact involved in the present case is shown by the record not only to have been put in issue in the former case, but to have been there decided adversely to the plaintiff. The judgment is affirmed with costs, and it is so ordered.

Affirmed.

43 MONDAY, *December 5th, A. D.* 1910.

No. 2130. October Term, 1910.

MARY E. NALLE, Appellant,

vs.

JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by

counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL,
December 5, 1910.

44 TUESDAY, *January 3rd, A. D.* 1911.

No. 2130.

MARY E. NALLE, Appellant,
vs.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. TERRELL, JUSTINA R. HILL, ELLEN S. MUSSEY, and BARTON W. EVERMANN.

On motion of Mr. J. M. Chamberlin, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Mary E. Nalle, appellant, and James F. Oyster, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey and Barton W. Evermann, appellees, a manifest error hath happened, to the great damage of the said appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3rd day of January, in the year of our Lord one thousand nine hundred and eleven.

Allowed by

——— ———,

——— ———.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

46 *(Bond on Writ of Error.)*

Know all men by these presents, That we, Mary E. Nalle, as principal, and Peyton D. Vinson, as surety, are held and firmly bound unto James F. Oyster, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey and Barton W. Evermann in the full and just sum of Three hundred dollars to be paid to the said James F. Oyster, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey and Barton W. Evermann certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 12th day of January, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Mary E. Nalle and James F. Oyster, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey and Barton W. Evermann, a judgment was rendered against the said Mary E. Nalle and the said Mary E. Nalle having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James F. Oyster, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey and Barton W. Evermann citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Mary E. Nalle shall prosecute said writ of error to effect, and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARY E. NALLE. [SEAL.]
PEYTON D. VINSON. [SEAL.]

Sealed and delivered in the presence of—

Approved by—

____ ____.
SETH SHEPARD,
Chief Justice, Court of Appeals of the District of Columbia.

[Endorsed:] No. 2130. Mary E. Nalle, Appellant, vs. James F. Oyster et al. Bond for Costs on Writ of Error to Supreme Court U. S. Court of Appeals District of Columbia. Filed Jan. 17, 1911. Henry W. Hodges, Clerk.

47 UNITED STATES OF AMERICA, ss:

To James F. Oyster, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey, and Barton W. Evermann, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Mary E. Nalle is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 17th day of January, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged Jan. 17th, 1911.

CLARENCE R. WILSON,
Counsel for Def'd'ts in Error.

[Endorsed:] Court of Appeals District of Columbia. Filed Jan. 17, 1911. Henry W. Hodges, Clerk.

48 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 47 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Mary E. Nalle, appellant, vs. James F. Oyster, William V. Cox, Mary C. Terrell, Justina R. Hill, Ellen S. Mussey, and Barton W. Evermann No. 2130, January Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 18th day of January, A. D. 1911.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,525. District of Columbia Court of Appeals. Term No. 218. Mary E. Nalle, plaintiff in error, vs. James F. Oyster, William V. Cox, Mary C. Terrell, et al. Filed February 15th, 1911. File No. 22,525.

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IN THE SUPREME COURT, UNITED STATES

October Term, 1912.

No. 218.

MARY E. NALLE, *Plaintiff in Error,*

vs.

JAMES F. OYSTER ET AL., *Defendants in Error.*

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

This case is here on a writ of error to the Court of Appeals of the District of Columbia to review its judgment affirming the judgment of the Supreme Court of the District of Columbia in favor of the defendants in error.

STATEMENT OF THE CASE.

This is an action brought by the plaintiff in error for damages arising from a libel published and a conspiracy entered into by the defendants in error to prevent her from being reinstated as a teacher in the public schools of the District of Columbia; and in the carrying out of such conspiracy, filing an untruthful and libelous affidavit, in the nature of an answer, to her petition filed in the Supreme Court of the District of Columbia for a writ of mandamus against the Board of Education of the District of Columbia to compel her reinstatement as a public school teacher.

The declaration contains two counts: The first is an action

of libel (Rec. pp. 1, 2, 3); the second is an action of trespass on the case in the nature of a common law conspiracy.

The facts as set forth in the declaration in substance are as follows:

That the plaintiff in error at the time of committing of the grievances complained of, had, for more than thirty years, been earning a livelihood as a teacher and member of the body of teachers of the public schools in the District of Columbia, and was then earning and receiving a salary of $1,000 per annum, and had always been considered a diligent and competent teacher and an honest and upright citizen of the United States; that the defendants in error, and certain others, at the time of the committing of the grievances hereinafter named, constituted the Board of Education of the District of Columbia, created by the act of Congress of June 20, 1906. This act provided that when a teacher is on trial, or being investigated, she shall have the right to be attended by counsel.

That on the 3d day of September, 1906, there were certain untrue, malicious, vague and indefinite charges, concerning plaintiff's moral character and reputation, under investigation by said Board; that without notice to the plaintiff, or opportunity given her to be heard, on the 14th day of September, 1906, she was dismissed from the rolls as a teacher in the public schools contrary to law. The only reason assigned for this act was that it was for the good of the service. That, feeling wronged, and having failed to secure redress by petition addressed to the Board, plaintiff in error filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus for her reinstatement to the position and emoluments of her office. That defendants in error, designing and intending to wrong, prevent and injure her in her right to employ her time and talents and direct her energies in the line of her occupation and calling as she saw fit, and specifically to prevent her from securing the writ of manda-

mus, and reinstatement to her position as a member of the body of teachers of the public schools, did, some time prior to the grievances hereinafter complained of, with the design of oppressing and injuring her, conspire among themselves, to ruin plaintiff and prevent her from obtaining her proper redress as prayed for in the mandamus proceedings, and to cause it to be believed, by the public in general, that she was deficient in the necessary academic and pedagogic equipment of a competent teacher, and thereby prevent her securing employment as a public school teacher; and in pursuance of this plan to injure and ruin her, defendants in error, maliciously and unjustly, composed and published and filed in the Clerk's office of the Supreme Court of the District of Columbia, a certain paper purporting to be their answer, and the answer of other members of the Board of Education, to the mandamus proceedings, which answer contained false, defamatory, scandalous and libelous charges, of and concerning her, and in and about her in her profession as a school teacher, in the words following:

> "These respondents (meaning defendants in error and others composing the Board of Education of the District of Columbia) found on examination that the relator (meaning plaintiff in error) was not sufficiently qualified in all respects to be competent to continue to teach during the ensuing year (meaning to continue to teach in the public schools of the District of Columbia for the year 1906-1907), but was deficient in the necessary academic and pedagogic equipment of a competent teacher. These respondents (meaning the defendants in error and others composing the Board of Education of the District of Columbia) were therefore unable lawfully to continue the employment of the relator (meaning plaintiff in error)."

That each of the defendants knew, at the time of the publication of this paper, that the Board of Education had in fact made no examination of plaintiff's qualifications as to competency, either pedagogically or academically; that defendants in error, and each one of them, knew that no one else in behalf of the Board of Education, or any member thereof, had examined or attempted to examine plaintiff in error, or made, or had made, any examination of the work of plaintiff in error for the purpose of determining her competency, academically and pedagogically; that the defendants in error, and each of them, knew, at the time of composing and filing the aforesaid false and malicious and defamatory libel, that plaintiff in error was thoroughly proficient both pedagogically and academically, and was so recognized by all who knew her both in and out of the schools; and the defendants in error, and each of them, knew, at the time of the composition and publication of the aforesaid false and defamatory libel, that the facts therein alleged were absolutely false in fact, and were done and intended to be done, as a mere subterfuge, all of which was done in pursuance of their aforesaid unlawful agreement and design to annoy, oppress and injure plaintiff in her aforesaid pursuit. By reason of the commission by the defendants of the aforesaid grievances, plaintiff in error was prevented from securing a fair and impartial hearing in the mandamus proceedings, and was prevented from being reinstated in her office as a member of the body of teachers of the public schools of the District of Columbia, and receiving the emoluments thereof; and she has been greatly injured in her good name and character, and brought into public scandal and disrepute and disgrace among all by whom she is in any wise known, and has been caused and suspected to be believed inefficient and wholly unfit to be employed in the line of her business and profession as a school teacher, and by reason thereof, she has been unable to secure any employment in the line of her profession, and

as such has been deprived of the support and emoluments, which would otherwise have accrued to her by being so employed, and on account of said premises, she has been greatly damaged and damnified, etc. (Rec. pp. 3, 4, 5.)

Defendants in error demurred to each of the counts on the ground of privilege (Rec. pp. 6, 7). The demurrer to the first count was sustained, and to the second count overruled (Rec. p. 7). Defendants in error thereupon filed two pleas to the second count; the first in substance being that of res adjudicata, or estoppel (Rec. pp. 7, 8), and the second that of privilege (Rec. pp. 7, 8). To each of these pleas plaintiff in error demurred; as to the first plea on the ground that the record, set out as an exhibit to said plea, shows on its face that said suit (mandamus proceedings) is not the same identical cause of action and did not necessarily involve the subject matter of this cause, and judgment therein did not in any way affect the subject matter of the present cause of action (Rec. pp. 37), and to the second plea on the ground:

(a) That it does not appear from said plea that the publication was privileged;

(b) That the false and malicious statements complained of were not material, relevant and competent, and necessarily involved in the mandamus proceedings, and that the doctrine of privilege has no application in law, as a defense to an action of trespass, in the nature of a common law conspiracy (Rec. p. 38).

The Court overruled the demurrers to both pleas and the plaintiff in error elected to stand on the pleadings. Judgment was given for the defendants and an appeal noted therefrom to the Court of Appeals, where the judgment of the trial court was affirmed.

ASSIGNMENTS OF ERROR.

The Court below erred:

1st. In affirming the trial court's order sustaining the demurrer of the defendants in error to the first count of the declaration; because the theory of absolute privilege is untenable where the libelous matter complained of was knowingly false, malicious and wantonly made.

2d. In affirming the judgment of the trial court in overruling the demurrer of the plaintiff in error to the first plea of defendants in error to the second count of the declaration; because on the face of the record in the mandamus suit, set out as an exhibit to the plea (Rec. pp. 10-37), it is shown that it is not the same identical cause of action and did not necessarily involve the subject matter of this suit; and the judgment therein contained in no way affected the present cause of action.

3d. In affirming the trial court's judgment in overruling the demurrer of plaintiff in error to the second plea of defendants in error to the second count of the declaration because:

(a) It does not appear from said plea that the publication therein set out was privileged.

(b) That the doctrine of privilege has no application in law as a defense to an action on the case in the nature of a common law conspiracy.

ARGUMENT.

First Assignment of Error.

THE COURT BELOW ERRED IN AFFIRMING THE TRIAL COURT'S ORDER SUSTAINING DEFENDANTS' DEMURRER TO THE FIRST COUNT OF THE DECLARATION.

In support of this proposition we stand squarely upon the authority of White vs. Nichols, 3 How. 266. That this authority contains the law of this jurisdiction, until it may be overruled by the Supreme Court of the United States, would seem to be beyond question. The case arose in the District of Columbia and there was not a dissenting voice of any of the justices, and consequently presumably contains the unanimous conclusions of the entire bench, which was then composed of such able jurists as Chief Justice Taney and Associate Justices Story, McLean, Wayne, Catron, McKinley, Daniels and Nelson. The opinion in that case shows that the court made a most exhaustive examination of all the authorities on the question of the doctrine of privileged communications in relation to actions of libel, both English and American, including that of Lake vs. King; and after so doing emphatically repudiated the doctrine enunciated in Lake vs. King on the ground that it was absolutely untenable and contrary to public policy. There is no decision in the Supreme Court of the United States subsequent to White vs. Nichols that in any way can be said to overrule the doctrine there propounded, and it has been cited, and quoted, and relied on, as enunciating the true principle, by the Federal Courts in the following cases:

Masterson vs. Brown, 72 Fed. Rep. 136, which was a case growing out of libel contained in pleadings filed in a legal proceeding.

In Merchants Insurance Co. vs. Buckner, 98 Fed. Rep. 222, the decision was by Mr. Justice Day, sitting as a member of the Circuit Court of Appeals with Justices Lurton and Taft.

See also McGee vs. Insurance Co. of North America, 112 Fed. Rep. 854.

We fully appreciate that the text writers, Newell, Biglow and Townsend, have formulated a different rule, gathered from modern State and English authorities, but in so doing

they have entirely overlooked, that the very ground which is the basis of the claim of absolute privilege, namely, that of public policy, is given by the Supreme Court of the United States in White vs. Nichols, as being the ground why such privilege does not, and should not, exist, and by careful examination of all the State authorities, it will be found that the doctrine of absolute privilege is traced directly back to the case of Lake vs. King, 1st Saunders, 120.

We shall not quote at large from White vs. Nichols, as we know the court, if not already thoroughly familiar with the principle there laid down, will carefully read the same. We reiterate, we place ourselves squarely upon the principles of that case.

Second Assignment of Error.

THE COURT BELOW ERRED IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT IN OVERRULING THE DEMURRER OF PLAINTIFF IN ERROR TO THE DEFENDANTS' FIRST PLEA TO THE SECOND COUNT OF THE DECLARATION.

That a mandamus proceeding, brought for the purpose of being restored to an office, can not reasonably, or seriously, be contended to be the same cause of action, or the same subject matter, as a libel, when in fact the alleged libel was not in existence, or had not been published until after the mandamus proceedings had been started, would seem to be too clear for argument, consequently, we shall not waste time in further discussion of this point.

If it is contended that we are precluded, or estopped, because the alleged libel was a question of fact put in issue by the pleadings in the mandamus cause, then we submit the record relied on must show not only that fact, but the further fact, i. e., that that issue was determined adversely to plaintiff.

It seems well settled law that a former judgment is not binding on the parties in a subsequent action by way of estoppel to any question of fact, unless it appears from the judgment or by extrinsic evidence, that such question was within the issue of the former action and actually litigated and determined therein.

Hopkins vs. Lee, 6 Wheat., 109.
Packett Co. vs. Sickles, 5th Wall., 592.
Aurora City vs. West, 7 Wall., 82.
Russell vs. Place, 94 U. S., 606.
Pacific R. R. vs. United States, 168 U. S., 1.
Cummings vs. Baker, 16 D. C. App., 1.
Angir vs. Ryan, 63 Minn., 373.
Teal vs. Terrell, 48 Tex., 491.

In Packett Co. vs. Sickles (supra) the court said:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, per se, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and farther, in cases where the record does not itself show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former

suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In Russell vs. Place (supra), the court, on page 608, said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In Teal vs. Terrell (supra), the court said:

"While it is not controverted that as a general principle, the judgment or decree of a court of competent jurisdiction is not only final as to the matters actually determined thereby, but also upon all matters properly involved in the issue passed upon and determined by the court, and that all matters put in litigation in a previous suit, and which could have been adjudicated therein, are concluded by it. But certainly it can not be so held, where the record clearly

> shows that the matter in question was not in fact passed upon or adjudicated by the court; and this, too, when it could not, under the pleading and verdict, have been decided adversely to the party against whom the judgment is claimed to operate as res adjudicata."

A judgment is not technically conclusive of any matter, if the matter is not such that it had, of necessity, to be determined before the judgment could have been given.

> Hunter vs. Davis, 19 Ga., 413.
> 1 Starkie's Ev., 223.
> Greenleaf Ev., S. 528.

In Bergeron vs. Richardott, 55 Wis., 129, it was held that where a verdict and judgment in an issue involving two issues of fact are consistent with a finding either way as to one of said issues the same is not res adjudicata between the parties.

> It should appear with certainty that the court must have found the fact in order to reach the verdict or decision; in other words, that the finding of the fact was necessarily involved.

See also Dixon vs. Merritt, 21 Minn., 196.

Applying this law to the facts in the instant case, it will be found that, although the record shows that the subject matter of this libel, as contained in the defendants' answer to the mandamus proceedings, was traversed (Rec. p. 27) by the relator (plaintiff in error herein) and issue joined thereon (Rec. p. 28) it was because Mr. Justice Anderson, in his opinion overruling the relator's (plaintiff in error herein) de-

murrer to said answer, held it was the material question to be determined. In his opinion, at page 24 of the record, he says:

> "The return or answer to the rule in this case must be construed as meaning, and is admitted by the demurrer to mean, that upon examination, that is, *upon observation and inquiry*, into the qualifications and competency of this relator in her capacity as a teacher, they found her to be 'DEFICIENT IN THE NECESSARY ACADEMIC AND PEDAGOGIC EQUIPMENT OF A COMPETENT TEACHER,' and that, in the exercise of their duty, as well as their authority, as they regarded it, they dismissed her for the good of the service."

And again, at page 26 of the record, Mr. Justice Anderson says:

> "It is admitted by the demurrer that she (plaintiff in error) was dismissed by the Board of Education upon the written recommendation of the Superintendent, *simply because she was lacking in the academic and pedagogic equipment of a competent teacher and for no other reason.*"

It will be further observed, that when the case was tried upon this issue the learned trial justice unquestionably avoided it. (Rec. pp. 34, 35, 36.)

The learned trial justice, at page 34 of the record, says:

> "There is some language in this return that seems to be regarded by the relator (plaintiff in error) as altogether controlling in this matter. It is true that the answer does say that upon examination the Board of Education found that the relator did not have the necessary qualifications of a competent teacher,

academically and pedagogically. It is stated in several forms as I remember, * * * (Rec. 34).

"Now, it was not necessary that the Board should find that she was lacking in the academic and pedagogic equipment of a competent teacher, if they found generally that she was not qualified to teach in the public schools; and that is one of the averments in the answer, or return. It does not follow that because every averment of the answer or return has not been sustained by the evidence in its every letter, that therefore the writ should issue in this case (Rc. p. 35).
* * *

"Now, there are just two things required by the Statute:

"First, that before the Board can act, the superintendent must act; and his action must be in the nature of a recommendation, and that recommendation must be in writing. When that recommendation is filed before the Board they may vote it up or may vote it down. The responsibility of the Superintendent ends with the filing of that recommendation. *In this case he recommended that the relator be dismissed for the good of the service. Not because she was lacking in her academic or pedagogic equipment,* but simply because that she be dismissed from the public schools for the good of the service; and the Board acting upon that recommendation dismissed her." (Rec. p. 35.)
* * *

"*If there had been any charges filed against the relator, and they had been suppressed, and then the Board had proceeded to oust her or dismiss her upon an entirely different ground, this Court would not tolerate a subterfuge of that kind for a moment.*" (Rec. p. 36.)

So, we respectfully submit that the Court of Appeals erred in sustaining the judgment of the trial court upon the plea that there had been a former adjudication (Rec. p. 42). The court says (Rec. bottom p. 42):

> "In stating the case presented by the pleadings we have ignored the question of privileged communication, for the reason that the judgment can be sustained upon the plea of former adjudication. * * * The alleged libel, forming the basis of the present suit, not only could have properly been determined in the mandamus proceedings, but clearly *was* determined and formed a material issue in arriving at the judgment therein.
>
> "While the opinion of the trial court is not part of the record in that case, we may look to it to ascertain what was in the mind of the court when the judgment was rendered. In considering the portion of the answer here involved, which constituted the chief defense of the defendants in that action, the learned justice said:
>
> > "In the absence of any prohibition in the statute, the power is inherent in the Board to dismiss teachers for want of suitable qualifications as such. * * * The return or answer to the rule in this case must be considered as meaning and is admitted by the demurrer to mean that upon examination—that is, upon observation and inquiry into the qualifications and competency of this relator in her capacity as a teacher—they found her deficient in the necessary academic and pedagogic equipment of a competent teacher."

> "And that in the exercise of their duty as well as their authority, as they regarded it, they dismissed her for the good of the service." * * *

It is of course patent that the court below cited in support of its decision, not the decision of Mr. Justice Anderson upon the merits, but the opinion of Mr. Justice Anderson on the demurrer, which brought about the framing of the issue. Therefore, the whole foundation of the argument of the Court of Appeals is necessarily founded upon an erroneous understanding of the record.

Third Assignment of Error.

THE COURT BELOW ERRED IN OVERRULING THE DEMURRER OF PLAINTIFF IN ERROR TO DEFENDANTS' SECOND PLEA TO THE SECOND COUNT OF THE DECLARATION.

If we understand the law correctly, the doctrine of privileged communications is peculiar to the law of libel and slander, and consequently could have no application to this count. It seems to be well settled law that where a matter is absolutely privileged in the sense that no action of libel or slander can be maintained thereon, as held by the English, and certain of the American State authorities; for instance, such as an affidavit made to secure a warrant for the arrest of another, nevertheless, conceding that if the statements of fact in the warrants be untrue and maliciously made, and without probable cause, the aggrieved party can maintain an action of malicious prosecution and the false and libelous matter contained in the warrant is competent evidence of the fact.

In White vs. Nichols (supra), the court, on page 289, said:

> "It is undoubtedly the right, we know, of every citizen to institute criminal prosecutions, or to exhibit criminal charges before the courts of the country and

such prosecutions are as much the regular and appropriate modes of proceeding as the petition is the appropriate proceeding before Parliament—*yet it never was denied that a prosecution with malice and without probable cause, was just foundation of an action, though such prosecution was instituted in the appropriate court and carried on with every formality known to the law.*"

See also Masterson vs. Brown, 72 Fed. Rep., 136.

Townsend on Slander and Libel, 3d Ed., No. 220, p. 380.

Olmstead vs. Partridge, 16 Gray, 381.

Beihofer vs. Loeffert, 159 Pa., 365.

Am. and Eng. Enc. L., 2 Ed., Vol. 19, p. 694.

It would seem to follow naturally and logically that the same rule of law would apply to any other kind of action that could be maintained for the injury as well as for libel and slander.

The second count of the declaration is not a count in libel but a count in trespass on the case in the nature of a conspiracy. This form of action superseded the old common law action of conspiracy, because it furnished a more adequate and more liberal remedy for malicious prosecutions or persecutions of every nature and description.

See Saville vs. Roberts, 1st Ld. Raym., 374.

Although not a common form of action, it has been recognized by nearly all the jurisdiction of this country and can be maintained wherever the plaintiff has been aggrieved and dammified by any unlawful acts done by others in the pursuance of a combination or conspiracy entered into for that purpose.

See Mott vs. Danfort, 6 Watt., 304.
Wildee vs. McKee, 111 Pa., 337.
Van Horn vs. Van Horn, 56 N. J. L., 318
Berplanck vs. Van Buren, 76 N. Y., 259.

Wildee vs. McKee (supra) is a case directly in point. This was an action of conspiracy brought by a school teacher against the members of the school board, and the declaration might be said to be on all fours with the one here, with the exception of the libel and scandal—the overt acts complained of as having been committed by the Board in carrying out their conspiracy—were not contained in a pleading in an action at law.

That the action of conspiracy is governed by different rules of law and rules of evidence other than that of libel would seem to hardly admit of argument. For instance, our statute of limitations as to actions for libel, malicious prosecution and false arrest, is one year. As to all other actions of trespass on the case, three years. (Code D. C., 1265.)

Assuming, for the sake of argument, that defendants, in carrying out the conspiracy entered into, should commit a series of libels against the plaintiff, although each libel in itself is actionable, if an action of libel was brought for each libel, in one declaration, but in several counts, the statute of limitations would begin to run from the date of the publication of each separate and distinct libel. Yet, suppose the purpose of the conspiracy was to absolutely ruin a man's business in the community and although each separate libel had some effect in so doing, yet, it was the last that accomplished the purpose of the conspirators. The injured person could bring an action on the case for the conspiracy, and, after setting out the conspiracy and each libel as an overt act committed in its pursuance, claim damages generally for the ultimate injury done. Pursuing this line of argument farther, suppose several of the libelous publications had

occurred more than one year previous to the filing of the action of conspiracy—would the suit be controlled by the section of the statute of limitations which refers to libel, or would it be governed by the general clause of the statute which relates to all other causes of action not enumerated therein? We respectfully submit that it would seem beyond question that the statute of limitations governing libels would have no application, as it is well settled law in criminal prosecutions for conspiracy that the statute begins to run from the last overt act (Ochs Appeal, 124 Ill., p. 399), and the same principle of law has been applied to civil actions of conspiracy.

Breitenberger vs. Schmidt, 38 Ill., App. 168. This is only one illustration, but many more could be given if necessary.

In conclusion we respectfully submit that in the particulars we have hereinbefore set out the court below erred and the judgment should be reversed.

JOHN C. GITTINGS,
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Attorneys for Plaintiff in Error.

March 15, 1913.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

MARY E. NALLE, *Plaintiff in Error*,
v.
JAMES F. OYSTER, WILLIAM V. COX, MARY C. Terrell, Justina R. Hill, Ellen S. Mussey, and Barton W. Evermann, *Defendants in Error.*
No. 218.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Court of Appeals of the District of Columbia to review a judgment of that court affirming a judgment rendered in the Supreme Court of the District of Columbia in favor of the defendants in error in an action of libel brought against them by the plaintiff in error.

The alleged libelous publication is contained in the answer of defendants in error in a former mandamus suit brought by plaintiff in error against them as members of the District of Columbia school Board to compel her reinstatement as a teacher. For convenience the plaintiff in error and defendants in error will be referred to as plaintiff and defendants, respectively.

The first count of the declaration, as amended, alleges that the plaintiff, Mary E. Nalle, was a teacher in the public schools in the District of Columbia, and that the defendants, without probable cause, and maliciously intending to injure the plaintiff, and to bring her into disgrace, and to cause it to be believed that the plaintiff was not competent to continue to teach in the public schools, by reason of having been found on examination to be deficient in the necessary academic and pedagogic equipment of a competent teacher, did publish and file in the clerk's office of the Supreme Court of the District of Columbia, as their answer in a legal proceeding wherein they and others composing the Board of Education of the District of Columbia are named defendants, a certain false and defamatory libel concerning the plaintiff, and of and concerning her, in her profession as a school teacher, which said libelous words are as follows:

> These respondents (meaning the defendants and others composing the Board of Education of the District of Columbia) found on examination that the relator (meaning the plaintiff) was not sufficiently qualified in all respects to be competent to continue to teach during the ensuing year (meaning to continue to teach in the public schools of the District of Columbia for the school year of 1906–1907), but was deficient in the necessary academic and pedagogic equipment of a competent teacher. These respondents (meaning defendants and others composing the Board of Education of the District of Columbia) were, therefore, un-

able lawfully to continue the employment of the relator (meaning plaintiff). (Rec., pp. 1, 3.)

The second count of the amended declaration alleges that the plaintiff was a school teacher, and that the defendants, and certain others, constituted the Board of Education of the District of Columbia, as provided by the act of Congress; that in 1906 there were certain untrue charges concerning the plaintiff's moral character and reputation under investigation by the said Board; that without notice to her or opportunity to be heard, the Board dismissed her from the rolls as teacher in the public schools of the District of Columbia; that thereafter the plaintiff filed her petition for a writ of mandamus against the said Board of Education to compel the Board to reinstate her to her position as school teacher; and that the defendants, in order to prevent the plaintiff from securing the writ of mandamus and otherwise to injure her, entered into an unlawful agreement and conspiracy amongst themselves, and caused it to be believed that she was deficient in the necessary academic and pedagogic equipment of a competent teacher, and in pursuance to said conspiracy, the defendants composed, published, and filed, as the answer of themselves and other members of the Board of Education, in said mandamus proceeding, a certain libelous and defamatory matter in the words as set out in the first count. This count then avers that the defendants knew that such statement was false and was made for the purpose of oppressing the plain-

tiff, and by reason whereof the plaintiff was prevented from securing a fair and impartial hearing in the said mandamus proceeding and was prevented from being reinstated as a school teacher and was otherwise injured and damaged. (Rec., pp. 3–5.)

The defendants' demurrer to the first and second counts of the declaration as amended was sustained as to the first count and overruled as to the second, with leave to plead over. The defendants thereupon filed two pleas to the second count of the amended declaration.

The first plea avers that in a certain mandamus proceeding wherein the plaintiff was the relator and the defendants were impleaded as the respondents, on the law side of the Supreme Court of the District of Columbia, the plaintiff sought a writ of mandamus for her restoration to the rolls as teacher in the public schools of the District of Columbia and that the defendants made answer and issue was joined and proceedings were had in said cause in respect of the identical causes of action now sued upon. The plea goes on to aver that by the judgment of the said Court upon an issue necessarily involved in the said cause and litigated between the said parties, it was ordered that the writ of mandamus be, and it was thereupon, denied; the plea further avers that the judgment of the mandamus proceedings remains in full force and effect and unreversed. The record of the mandamus suit is attached to and made part of the plea. (Rec., pp. 7–8.)

The second plea avers that in 1906 the defendants constituted the Board of Education of the District of Columbia, in which was vested the control of the public schools of the District, under and by virtue of the laws of the United States, and by virtue of the authority vested in them as such Board they dismissed the plaintiff from the position of teacher in the public schools; that thereafter the plaintiff, in a matter within the jurisdiction of the court, filed her petition for a writ of mandamus against the defendants to require her restoration as a teacher in the public schools; and thereafter the defendants, as respondents to the petition of mandamus, filed their answer in said cause, "and upon a matter material, relevant, pertinent, and necessarily involved in said cause, litigated therein between said parties, set up the identical matters complained of in the present suit." The plea sets out the words of the answer complained of in the amended declaration, and further alleges that "by consideration and judgment of said court, and upon an issue necessarily involved in said cause and litigated between said parties," it was ordered that the mandamus be denied, as appears from a copy of the record of said mandamus proceedings appended and made a part of the plea. (Rec., pp. 8, 9.)

The complete record of the mandamus proceeding appended to and made part of both pleas appears on pages 10 to 37 of the record, and includes the petition for a writ of mandamus, the answer, the demurrer

thereto, the order overruling the demurrer with leave to plead, and opinion of the court thereon, the traverse, joinder of issue, testimony, and judgment of the court dismissing the petition, together with the opinion of the court in so doing. The testimony of Dr. Chancellor, a witness called on behalf of the relator (Rec., p. 34) is to the effect that at a meeting of the Board of Education, when all the members were present, the plaintiff's fitness for continuation in service as a school-teacher was discussed, and that it was the consensus of opinion that she ought to be dismissed from the service because she was not qualified to continue as a teacher, and that he, Dr. Chancellor, made his written recommendation that she be dismissed for the good of the service, and the Board of Education acted on that.

In his opinion in sustaining the demurrer Mr. Justice Anderson (Rec., pp. 22–26) quotes substantially all the words incorporated in the defendants' answer in the mandamus suit which are herein complained of as libelous, and holds that they are in themselves sufficient to constitute a defense, and he bases his decision thereon. In his final opinion (Rec., pp. 34–37) Mr. Justice Anderson again refers to the words complained of as libelous in the present action which were used in the respondents' answer, and repeatedly comments thereon, using them as the very basis of his decision.

The plaintiff filed separate demurrers to the defendants' first and second pleas to the declaration, as amended, which demurrers were overruled; and upon

the plaintiff's electing to stand on the demurrers, judgment was entered and an appeal taken to the Court of Appeals of the District of Columbia. The case was there affirmed, and is now here for review on writ of error.

ASSIGNMENT OF ERROR.

The plaintiff's assignments of error may be grouped under three heads, as follows:

I.

That the alleged libelous matter contained in the defendants' answer in the mandamus proceeding, and herein sued upon, was the basis of the judgment in the mandamus case, and hence the right to utter them, on the occasion which they were uttered, was adjudicated, and the plaintiff is estopped to complain of such utterance. (Assignment of Error No. 2.)

II.

The alleged libelous matter being contained in a pleading in an action at law was absolutely privileged, as such matters were pertinent and material to the defense in that action, and neither malice nor falsity can be inquired into. (Assignments of Error Nos. 1 and 3a.)

III.

The charge of conspiracy in the second count of the amended declaration can not render the allegations of the defendants' answer in the mandamus case actionable if they are not actionable without such charge. (Assignment of Error No. 3b.)

ARGUMENT.

I.

The matter is res judicata and the plaintiff is estopped by the former judgment referred to in the pleadings.

The decision of the Court of Appeals of the District of Columbia in this case (Rec., pp. 41–43) is upon the sole ground that "The main question of fact involved in the present case is shown by the record not only to have been put in issue in the former case (the action of mandamus), but to have been there decided adversely to the plaintiff."

The plaintiff in both actions is the same person. The defendants in this action were all named parties defendant in the mandamus proceedings. The jurisdiction of the Supreme Court of the District of Columbia to entertain the petition for mandamus and the present action is not questioned. The rule of *res judicata* and the estoppel arising therefrom is too well settled to necessitate its support by authority. The only question is the true extent of the rule and its application to the particular facts under consideration.

The question is not, as claimed by the plaintiff, whether the alleged libel was in existence when the petition for writ of mandamus was filed, but whether upon final determination of the mandamus suit the matters alleged in the answer of the respondents (defendants here) were necessarily involved in the determination of the mandamus proceedings and were put

forth as a ground of defense therein and were a basis of the judgment of the court.

To the answer in the mandamus suit, the plaintiff interposed a demurrer (Rec., p. 21), the grounds being that the averments of the answer here complained of as libelous, did not constitute a justification for defendants' dismissing the plaintiff's petition. Mr. Justice Anderson, in overruling this demurrer, held (Rec., pp. 22–26) that it was not intended by the act of Congress of 1906 to tie the hands of the Board so that it could not dismiss a teacher who was found to be lacking in the necessary qualifications of a competent teacher and that such power was inherent in the Board. Such finding, the court held, could be set up by the members of the Board in justification of their dismissing the plaintiff, and, being admitted by demurrer to be true, justified defendants in so doing. Upon this ground the court overruled the demurrer.

The plaintiff thereupon filed a traverse (Rec., p. 27) to the answer. Motion was filed to strike out certain portions of the traverse (which was eventually granted) and issue was joined upon other paragraphs of the traverse which were made the basis of the present suit. To support these issues, she called Dr. Chancellor as a witness on her behalf (Rec., p. 34), who stated "that it was the opinion of the Board * * * that she ought to be dismissed from the service because she was not qualified to continue as a teacher * * * whereupon he made his written recommendation that she be dismissed for the good of the service and the Board acted upon that."

Mr. Justice Anderson, in his opinion denying the writ of mandamus upon the issues so framed, held that the Board, in acting on the recommendation of Dr. Chancellor, reached the conclusion after conference that she was not qualified to continue as a teacher, acted fully within the requirements of the statute and was justified in so doing.

The Court of Appeals, in affirming this decision, 31 App., D. C. 311, 317, said:

> The answer of respondents set forth that the relator was dismissed because she was lacking in the academic and pedagogic equipment of a competent teacher, and that no charges of any kind were filed against her. This is specifically denied by the traverse of the relator. The evidence of the witness Chancellor, however, clearly discloses that relator was dismissed from the service upon the recommendation of the Superintendent, after an inquiry made by the Board as to her professional qualifications to teach in the public schools of the District. The whole question before us is, whether or not the Board has power to make such an inquiry and dismiss relator without according her a hearing as provided in Section 10 of the Act. * * * Section 10 is an independent provision for the protection of teachers against charges that are not confined to the professional qualifications of the teacher. * * * We are of the opinion that the Board of Education, in dismissing relator from the schools, acted within the authority vested in it by the Act of Congress.

It thus appears that throughout the mandamus suit there was an effort to lead the court to hold that the act of Congress required the Board to give the plaintiff notice of the charges against her, a trial, and the right to be represented by counsel before she could be dismissed; but both Mr. Justice Anderson and the Court of Appeals held that this was not necessary, and the allegations in the answer relied upon by the defendants as setting forth the justification for their acts, which are here complained of as libelous, were held to be a complete defense to the petition for mandamus.

Further, when these allegations were traversed and testimony was taken, the testimony established the allegations. The words complained of in this suit as libelous were not only drawn into question in the mandamus suit, but their truth denied, and, when judgment was rendered, were found, in the opinion of the court, to constitute a complete justification for the acts of the defendants.

This analysis of the proceedings in the mandamus suit shows that not only did the averments in the defendant's answer form the basis for the adjudication of that suit, but also that all efforts of plaintiff's counsel to bring other matter into the case were frustrated, and both courts held that the words herein complained of as libelous were a statement of matter which constituted a justification of the acts of the respondents complained of in the mandamus suit.

But the plaintiff argues that the mandamus proceeding brought for the purpose of restoring her to an office can not reasonably or seriously be contended to be the same cause of action or the same subject matter as the libel, when the alleged libel was not in existence nor had it been published until after the mandamus proceeding had been started.

If this contention were sound, there would be no room for the application of the doctrine of *res judicata* in any case; for manifestly the test is not whether the libel was in existence at the time the first suit was started, but whether at the time of the filing of the libel suit the right to use the words therein complained of had been litigated and adjudicated. If the contention of the plaintiff is sound, then this court has erred in its numerous decisions that an adjudication respecting prior installments or coupons is conclusive between the parties relating to subsequent installments or coupons. In such cases the subsequent installments or coupons may not have been due when the suit relating to prior installments or cou, s was adjudicated, but the binding effect of such adjudications has been repeatedly held.

Lumber Company v. *Buchtel*, 191 U. S. 638.
Bissell v. *Spring Valley Township*, 124 U. S. 225.
Johnson Company v. *Worten*, 152 U. S. 252.

Again, it is claimed by the plaintiff that, although the records show that the subject matter of the alleged libel contained in the answer in the manda-

mus proceeding was traversed by the plaintiff, and issue joined thereon, Mr. Justice Anderson considered the issue to be immaterial in the proceeding, and purposely refrained from deciding it. Such a statement is not borne out by the records as set forth heretofore in this brief. An examination of the opinion of Mr. Justice Anderson in the mandamus suit shows that he had distinctly in mind and specifically determined this question: "Did or did not the Board of Education discharge Miss Nalle because of her deficient equipment as a teacher?" and Mr. Justice Anderson determined that the Board did discharge Miss Nalle for the reason assigned. The only issue that the court might be said to have evaded, which was an issue proper to be evaded, was whether the findings of the Board were correct as a matter of fact. In other words, Mr. Justice Anderson refused to review the findings of the Board of Education, and held only that they had a right under the statutes to discharge Miss Nalle for the reason assigned by them in the pleadings in the mandamus. (See opinion of Mr. Justice Anderson, Rec., p. 36.)

The Court of Appeals (Rec., p. 43; 36 App., D.C., 36–41), in affirming the judgment of Mr. Justice Anderson, said:

> The alleged libel, forming the basis of the present suit, not only could properly have been determined in the mandamus proceeding, but clearly was determined, and formed a material issue in arriving at the judgment therein.

It has been repeatedly held by this and other courts that a person is estopped from again setting up a claim in a subsequent suit which was necessarily involved in a prior suit between the same parties and this whether such matter was actually considered by the court or not.

In *Beloit* v. *Morgan*, 7 Wall. 619, 623, it was said:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In *Cromwell* v. *County of Sac*, 94 U. S. 351, 353, it was said:

> That a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate.

Hopkins v. *Lee*, 6 Wheat. 109, 113:

> A fact which has been directly tried, and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or in any other court.

New Orleans v. *Citizens Bank*, 167 U. S. 371:

> *It is not essential the causes of action should be the same.* (The italics are ours.)

Southern Pacific R. R. Co. v. *United States*, 168 U. S. 1:

> A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

See also:

Baker v. *Cummings*, 181 U. S. 117.

Dickenson v. *Wilkinson*, 3 How. 57, 61.

Southern Minnesota Railway v. *St. Paul S. C. R. Company*, 55 Fed. 690.

Waterbury v. *Marine Society*, 94 Maine, 122.

North River Meadows Company v. *Schrewsburg Church*, 22 N. J. L. 424.

Holt County v. *National Life Ins. Co.*, 80 Fed. 686 (C. C. A.).

Upon these authorities it is submitted that, as affecting the question of *res judicata*, it is immaterial that the questions alleged to have been settled by the former adjudication were determined by a different kind of proceeding or different kind of action from that in which the estoppel is set up, the parties and issues being the same. It is not essential that the cause of action should be the same, but merely that the right, or question, or fact, or issue in both

actions should be the same. In this action the right that is questioned is the right of the defendants to plead the alleged libelous matter in the mandamus action as their defense when their action in dismissing the plaintiff as a teacher in the public schools was called into question. In the mandamus action, the court held that these defendants, acting with others as the Board of Education, had the right to dismiss the plaintiff as a teacher because they found, as set up in the answer, that she was not sufficiently qualified in all respects to continue to teach in the public schools. Thus was the very matter here complained of finally adjudged.

The plaintiff is, therefore, estopped to raise again this question in an action of libel between the same parties.

II.

The alleged libelous matter referred to in the first count of the declaration was absolutely privileged, and malice can not be predicated upon it.

The first assignment of error relates to the action of the trial court in sustaining appellees' demurrer to the first count of the declaration. Plaintiff contends that the theory of absolute privilege is untenable where the libelous matter complained of was knowingly false, and maliciously and wantonly made. In support of this contention, she relies solely upon the case of *White* v. *Nicholls*, 3 How. 266.

This case of *White* v. *Nicholls* will be analyzed and discussed later in this brief; suffice it to say, for the

present, that the statement in that case that there is no absolute privilege in law, is:

(*a*) *A mere dictum;* the case was really a case of conditional privilege; everything beyond that is *obiter*.

(*b*) Distinguishable, because the action complained of was not, as here, in pursuance of a public official duty.

In the mandamus action, it was held by the Court of Appeals, 31 App., D. C., 312, that the management and final administrative authority over public schools is vested in the Board of Education, and that the defendants as such Board acted within their authority in dismissing the plaintiff as a teacher.

If, then, the action of the Board was in pursuance of the public official duty vested in the defendants as individuals of the Board, it likewise became their public official duty when called upon to account for such actions in a court of law in the mandamus proceeding referred to, to make a full statement of the basis of their public act authorized by law. In the performance of this duty they incorporated in their answer in the mandamus proceeding the alleged libelous matter now complained of. The case under consideration presents a totally different question from that presented in the case of *White* v. *Nicholls*.

Communications are, on account of the occasion on which they are made, prima facie, or, as the books and authorities have termed them, "conditionally privileged; that is, they do not amount to defamation until it appears that the communications had their

origin in actual malice in fact." In such cases it is incumbent on the plaintiff to show in addition to the injurious publication a malice in fact and that the occasion was seized upon as a mere pretext. In this class are embraced all cases where the author of such alleged mischief acted in discharge of a duty which the ordinary exigencies of society or his own private interest or even that of another called upon him to perform, such as giving the character of a servant, warning a friend against some one who was seeking to do him an injury, or in the presentation of a petition to an official to correct grievances. Such communications are termed conditionally privileged and will protect the publisher unless the plaintiff, in an action for libel, can prove that there was actual malice on the part of the defendant. Such was the case of *White* v. *Nicholls.*

There is, however, another class of cases which are *absolutely privileged* and depend in no respect for their protection on their *bona fides* or upon the truth of the statements or upon the motive which prompted them. The occasion is the absolute privilege, and the only questions are whether the occasion existed and whether the matter complained of is pertinent to the occasion.

In this class are words spoken or written in judicial proceedings. To the catalogue of absolutely privileged communications belong all words used by the parties in their pleadings in the due course of judicial proceedings which may be relevant and material to the case in which they appear. All charges, allega-

tions, and averments contained in regular pleadings addressed to and filed in a court of competent jurisdiction which are pertinent and material to the redress or relief sought, whether legally sufficient to obtain it or not, are absolutely privileged, and the law affords immunity from suit.

While the English decisions have gone further and have uniformly held that anything, whether pertinent or not, said or written in a judicial proceeding is absolutely privileged, the courts of this country have limited the doctrine of absolute privilege to statements that are pertinent or material or have relation to the cause of action or subject matter.

In the following cases it has been held that matters appearing in the pleadings or statements of counsel made in the course of judicial proceedings which are pertinent and material to the issue are absolutely privileged and will not support an action for libel against the party making them.

McGehee v. *Insurance Co.*, 112 Fed. 853 (C. C. A., 5th circuit).
King v. *McKissick*, 126 Fed. 215.
Conley v. *Key*, 98 Ga. 115.
Wilson v. *Sullivan*, 81 Ga. 238.
Burdette v. *Argyle*, 94 Ill. App. 171.
Strauss v. *Meyer*, 48 Ill. 385.
Gardemal v. *McWilliams*, 43 La. Ann. 454.
Maulsby v. *Reifsnider*, 69 Md. 143.
McLaughlin v. *Cowley*, 127 Mass. 316.
Rice v. *Coolidge*, 121 Mass. 393.
Aylesworth v. *St. John*, 25 Hun, 156.
Link v. *Moor*, 84 Hun, 118.

Lawson v. *Hicks*, 38 Ala. 279.
Gaines v. *Aetna Ins. Co.*, 104 Ky. 695.
Bartlett v. *Christhilf*, 69 Md. 219.
Marsh v. *Ellsworth*, 50 N. Y. 309.
Moore v. *Mfrs. Nat. Bank*, 123 N. Y. 420.
Gilbert v. *The People*, 1 Denio (N. Y.) 41.
Cook v. *Hill*, 3 Sandf. (N. Y.) 341.
Warner v. *Paine*, 2 Sandf. (N. Y.) 195.
Perkins v. *Mitchell*, 31 Barb. 461.
Garr v. *Selden*, 4 Comst. (N. Y.) 91.
Nissen v. *Cramer*, 104 N. C. 574.
Lea v. *White*, 4 Sneed (Tenn.) 110.
Mower v. *Watson*, 11 Vt. 536.
Clemmons v. *Danforth*, 67 Vt. 617.
Abbott v. *Natl. Bank*, 20 Wash. 552.
Johnson v. *Brown*, 13 W. Va. 71, 119.
Jennings v. *Paine*, 4 Wis. 358.
Astley v. *Younge*, 2 Burr. 807.

In the case of *Hoar* v. *Wood*, 3 Met. 193, 196, which is cited as a leading case, Chief Justice Shaw said:

> We can perceive no substantial difference between the case of counsel and that of a party. * * *
>
> Then we take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were

spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry. * * *

Still, this privilege must be restrained by some limit; and we consider that limit to be this: That a party or counsel shall not avail himself of his situation, to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes, and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions. For these views of the law, and for a more full discussion of the whole subject, we refer to the following English and American cases: *Molton* v. *Clapham*, March, 20; *Astley* v. *Younge*, 2 Burr., 807; *Hodgson* v. *Scarlett*, 1 Barn. & Ald., 232, S. C. at Nisi Prius, Holt, 621, and notes; *Padmore* v. *Lawrence*, 11 Adolph & Ellis, 380; *Ring* v. *Wheeler*, 7 Cow., 725; *Hastings* v. *Lusk*, 22 Wend., 410; *Mower* v. *Watson*, 11 Verm., 536; *Bradley* v. *Heath*, 12 Pick., 163.

Malice can not be predicated upon matter which is pertinent and material to a case subject to inquiry before a court. No one is permitted to allege what was rightfully done in a judicial proceeding was done with

malice. Though the words used were false and malicious, the privilege is absolute:

Lawson v. *Hicks*, 38 Ala. 279.
Hollis v. *Meux*, 69 Cal. 625.
Burdette v. *Argyle*, 94 Ill. App. 171.
Gaines v. *Ætna Ins. Co.*, 104 Ky. 695.
Gardemal v. *McWilliams*, 43 La. Ann. 454.
Bartlett v. *Christhilf*, 69 Md. 219.
Marsh v. *Ellsworth*, 50 N. Y. 309.
Garr v. *Selden*, 4 N. Y. 91.
Gilbert v. *The People*, 1 Denio, 41.
Mower v. *Watson*, 11 Vt. 536.
Link v. *Moor*, 84 Hun, 118.
Moore v. *The Mfrs. Nat. Bank*, 123 N. Y. 420.
Nissen v. *Cramer*, 104 N. C. 574.
Warner v. *Paine*, 2 Sandf. 195.

Wilson v. *Sullivan*, 81 Ga. 238:

> However false and malicious, they are not libelous.

If the person charging facts in a pleading in a judicial procedure in good faith believes the words thus written to be material and pertinent to the issues presented in such proceedings, then the rule of *absolute privilege* extends to such person, although the matter may be found to be not strictly material and pertinent.

Lawson v. *Hicks*, 38 Ala. 279.
Burdette v. *Argyle*, 94 Ill. App. 171, 175.
Aylesworth v. *St. John*, 25 Hun, 156.
Hastings v. *Lusk*, 22 Wend. 410.
White v. *Carroll*, 42 N. Y. 161.

Warner v. *Paine*, 2 Sandf. (N. Y.), 195:

> Where matter is put forth by a party or his attorney or counsel, in the course of a judicial proceeding, which may possibly be pertinent, courts should not, and will not, feel disposed so to regard it as to deprive its author of his privilege and protection. . . . The privilege to parties to a legal proceeding, or to their attorneys or counsel, is absolute and unqualified, if what they say or state be pertinent, and it is difficult, if not impossible, to find a case where either has been held liable, except where the matter spoken or published was grossly and palpably impertinent.

In the case of *Lea* v. *White*, 4 Sneed (Tenn.), 111, 114, the matter alleged to be libelous consisted of a return to a writ of habeas corpus; and the court thus states the question upon which the case turned and the decision of the question:

> Could the defendant have reasonably supposed it necessary to his defense to return, on the writ of *habeas corpus*, the alleged libelous matter? We think he might have reasonably supposed that the statement would exert an influence on the mind of the court; and this being so, he had a right to introduce it, and rely upon it in his defence. And having this right, he is, under the law, absolutely privileged, though he may have been actuated by motives vindictive and malicious.

Lawson v. *Hicks*, 38 Ala. 279, 289:

> A party or his representative is not amenable to an action, where, although the matter stated

> was impertinent, he believed that it was relevant, and had reasonable or probable cause so to believe. Cooke, in his work on Defamation (p. 62), to which we have heretofore referred, says: "It seems that the parties or their representatives are entitled to state anything which although not strictly relevant, may be fairly supposed by them to weigh with the court."

In *Perkins* v. *Mitchell*, 31 Barbour (N. Y.), 461, 468, the court said:

> In the case of judicial proceedings, which is all that is material now, words spoken or written by a party, by counsel, by a judge, a juror or a witness, although false, defamatory and malicious, are not actionable if they were uttered in the due course of the proceeding, in the discharge of a duty, or the prosecution or defense of a right, and were pertinent and material to the matter in hand.

In *Gaines* v. *Aetna Insurance Co.*, 104 Ky. 695, the court said:

> We are of the opinion that the demurrer was properly sustained. The paragraph of the answer objected to as libelous was certainly pertinent and relevant to the defense presented by appellee to that action, and though the allegations be untrue, and were known to be untrue when made, and also conceding that they were made with bad motives, still, for obvious grounds of public policy, no action will lie therefor. Their truth has been inquired into in the former case. * * * If the defense presented be pertinent and rele-

vant, and one permitted by law, a party has a right to make it, without subjecting himself to an action for libel if he fails to maintain it. This is absolutely privileged.

In *Harlow* v. *Carroll*, 6 App. D. C. 128 the libelous matter complained of appeared in an answer of the defendant in an equity suit. Such libelous matter was ordered by the court of equity to be stricken from the pleadings as irrelevant, impertinent, and scandalous. On motion for rehearing in the Court of Appeals Mr. Justice Morris fully reviewed the authorities upon the question as to how far the doctrine of privilege extended as to libelous matter appearing in papers filed in judicial proceedings, and came to the conclusion, as expressed in the authorities cited in this brief, that if the words alleged to be libelous are relevant and pertinent to the question before the court, the privilege is absolute. Mr. Justice Morris adopts with approval the decision of Chief Justice Shaw in the case of *Hoar* v. *Wood*, quoted in the case of *Maulsby* v. *Reifsnider*, 69 Md. 143, where it is said:

> We quite agree however with Bramwell, J. A., in *Seaman* v. *Netherclift*, that "relevant" and "pertinent" are not the best words that could be used. These words have in a measure a technical meaning, and we all know the difficulty in determining in some cases what is relevant or pertinent. With Lord Chancellor Cairns we prefer the words "having reference to" or "made with reference;" or in the language of Shaw, C. J., "having relation to the cause or subject-matter."

This is fully within the scope of the doctrine contended for by the defendants, and Mr. Justice Morris tersely sums up the limitation on the absolute privilege as follows (p. 139):

> For the matter to which the privilege does not extend must be so palpably wanting in relation to the subject matter of controversy as that no reasonable man can doubt its irrelevancy and impropriety; *and it will always be a matter of law for the judge, and never a question of fact for the jury, to determine that irrelevancy and impropriety.* (The italics are ours.)

In *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167, De Arnaud was an applicant for a medal of honor and the defendant Ainsworth was the Chief of the Record and Pension Office. In the line of his duty Ainsworth reported on the claim of De Arnaud to the Secretary of War, which report was adverse to the plaintiff. In a suit for libel on matters contained in this report, the court held that such report was an *absolutely privileged* communication for which the defendant Ainsworth could not be held liable. The court by Chief Justice Alvey said (p. 177):

> The report is the official action of the War Department, and it was made in the course of official duty of the person required to make it. There is nothing in the report that does not relate to or reflect upon the alleged questionable character of the plaintiff and the want of a just foundation for the claim to honorable distinction set up by him.
>
> The question of motive, or whether there was a want of good faith on the part of the

> defendant in making the report, is not a material question in the case. A party is not liable for the motive with which he discharges an official duty, nor is he liable for any mistake of fact he may commit in the course of the exercise of that duty. Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communications to a superior when such report or communication is made in the course and discharge of his official duty.

On page 181 the court, in quoting with approval from the case of *Dawkins* v. *Paulet*, L. R., 5 Q. B. 94, which was decided on a demurrer to replication alleging that the libel was written by the defendant with actual malice, without any reasonable or probable or justifiable cause, and not bona fide, or in the bona fide discharge of the defendant's duty as superior officer, said:

> I apprehend that the motives under which a man acts in doing his duty which it is incumbent upon him to do can not make the doing of that duty actionable, however malicious they may be.

The court further said:

> It would seem to be clear, therefore, that the principle of absolute privilege is unquestionably established by the English authorities, as applicable to a case like the present; and that principle is not less clearly and fully established in this jurisdiction by the case of *Spalding* v. *Vilas*, 161 U. S. 483, to which we have referred.

This case is particularly applicable to the case under consideration, because Ainsworth, in that case, had a duty to perform in reporting to the Secretary of War; in the present case the defendants were invested, by their office as members of the school Board, created in pursuance to an act of Congress, with the duty of discharging teachers in the public schools who were not competent to hold their positions. To state the proposition that members of such a Board, who are invested with such powers, involving their discretion, can not defend their act by stating the reasons for dismissing a teacher when called into a court of justice to restore the teacher dismissed, is to refute it. Under their legal obligations as members of the school Board they were required to state to the court the reasons for their action in dismissing the plaintiff; and being under such legal obligation their statement to the court, as contained in their answer is, under the *De Arnaud* case absolutely privileged.

See also *Farr* v. *Valentine*, 38 App., D. C. 413, in which it was held that a communication from the Commissioner of Indian Affairs and the Secretary of the Interior, reflecting upon a subordinate, was privileged absolutely.

In the case of *Johnson* v. *Brown*, 13 West Va. 71, it was held that libelous matter published in the due course of legal procedure can not be the basis of a libel suit. If the declaration shows on its face that the libelous matters complained of were pub-

lished in the due course of legal procedure, it will be held fatally defective on general demurrer unless the declaration states facts showing that the court in which the libelous matters were published had no jurisdiction in the case, or that the libelous matters alleged were not pertinent to such judicial procedure.

This case so fully and carefully reviews the English and American authorities on the subject of privilege in judicial proceedings that we quote from it at length. The court, in commenting upon the case of *White* v. *Nicholls*, said (p. 123):

> It will be observed, that there was no occasion for the court in this case to consider, whether matters, contained in any document in the regular course of judicial proceedings, were, or were not, absolutely privileged, or to draw any nice distinctions on the subject, the case before them being *clearly not even a conditionally privileged communication*. The authorities cited by Justice Daniel in support of his conclusions are. (Quoting them.) * * *
>
> These cases utterly fail to support Justice Daniel in the broad conclusion, which he has reached, that there is no case of absolutely privileged communication, for which no action of slander or libel will lie though uttered or published with express malice and without probable cause. * * * But in none of the cases cited by Justice Daniel, and indeed in no case, that I have seen, has it been decided by the court, that there can be no case of absolutely privileged publication, for which no action of slander or libel can be brought,

even though shown to be malicious; but on the contrary it has been often held, that such cases do exist, and very generally it has been admitted, that such was the law, by eminent jurists. * * *

When I say, there has been no case, in which it has been held, that a class of absolutely privileged communications does not exist, I do not even exclude the case of *White* v. *Nicholls;* for in that even the publication before the court did not, as all the authorities show, belong to a class, which has ever been held to be absolutely privileged. It was easy to show, that this publication was only conditionally privileged, as was decided by the Supreme Court, without going further and contending, that all other publications were only conditionally privileged.

A brief review of these cases will show, that they not only do not sustain, *as decisions*, the deduction drawn from them by Justice Daniel; but that it can not be inferred, that any of the judges who sat in these cases, entertained such views of the law as Justice Daniel.

Then after reviewing all the cases cited in *White* v. *Nicholls*, the court continued at page 128 as follows:

We have reviewed all the authorities cited by Justice Daniel, and have seen, that none of them are in conflict with the position, that express malice may be shielded by its being expressed in judicial proceedings in certain forms. On the contrary we have seen, that the decision of *Lake* v. *King*, 1 Saund. 163, is in accord with the preceding and subsequent

English decisions. And the review of the American authorities will show that the overwhelming weight of authority is opposed to Justice Daniel's idea, that there is no case, in which an action of slander or libel will not lie for libelous matter, spoken or written in the course of judicial proceedings. All these American authorities seem to me fully to establish a class of absolutely privileged publications. Nearly every American case, to which I have referred before, is either an express decision, that the case then under consideration of the court belonged to this class of absolutely privileged communications, or is based on the assumption that such a class exists, and that the particular case before them did not belong to that class. * * *

Justice Daniel in *White* v. *Nicholls*, 3 How. (U. S.), 387, regards this holding, that there is a class of absolutely privileged communications, places a class of persons above the cognizance of law, and absolves them from the commands of justice. * * * The real question is not, whether "anyone should be privileged to do injury," but whether it is proper on grounds of public policy to remit such a question in a particular class of cases to a jury. The reasons against doing so are simple and obvious. * * *

The authorities very generally concur, that as a general rule the pleadings in any civil suit belong to the class of absolutely privileged publications, as will appear from the cases above cited. Indeed all, who admit that there is any such class, agree, that generally

> the pleadings in a civil suit belong to this class. * * *

Again, at p. 135:

> American cases have however expressly applied the qualification to the pleadings in a cause, and say even in pleadings, that the libelous matter must be pertinent, to make it absolutely privileged.

This case, it is submitted, correctly states the law as to communications absolutely privileged, and sharply defines the limits of the decision in the case of *White* v. *Nicholls*.

Counsel for plaintiff, however, contends that this court in *White* v. *Nicholls* repudiated the doctrine of absolute privilege on the ground that it was opposed to public policy. In relying wholly upon *White* v. *Nicholls*, plaintiff adopts the reasoning of Mr. Justice Daniel, that no one ought to be privileged to do an injury, and that to grant immunity from suit is to place a class of transactions above the cognizance of the law.

It is said in the brief filed on behalf of plaintiff:

> There is no decision in the Supreme Court of the United States subsequent to *White* v. *Nicholls* that in any way can be said to overrule the doctrine there propounded.

But this court has in several instances recognized, adopted, and applied the principle of absolute privilege.

In *Randall* v. *Brigham*, 7 Wall. 523, 535, 536, Mr. Justice Field said:

> It is a general principle applicable to all judicial officers, that they are not liable to a

> civil action for any judicial act done within their jurisdiction. * * *
>
> This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this county ever since its settlement.

In *Bradley* v. *Fisher*, 13 Wall. 335, 351, 354, Mr. Justice Field again enunciated this doctrine, and said:

> Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. * * *
>
> The exemption of judges * * * cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence.

In *Vogel* v. *Gruaz*, 110 U. S. 311, 315, it was held that a communication made to a State's attorney regarding an alleged crime is absolutely privileged. Mr. Justice Blatchford said:

> Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the ground being, that greater mischief will probably result from

requiring or permitting them to be disclosed than from wholly rejecting them.

In *Spalding* v. *Vilas*, 161 U. S. 483, it was held that the protection of absolute privilege extends to all communications made by the head of one of the executive departments in a matter within his official duty and within the scope of his authority. This court affirmed the judgment of the lower court sustaining a demurrer to a declaration which averred that the Postmaster General had, with malicious intent to injure plaintiff, issued a circular which, besides being untrue, was maliciously intended to cause persons to believe that the plaintiff's claim was false and fraudulent. Mr. Justice Harlan said (p. 498):

> We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. * * * The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the

> trial, that the defendant acted maliciously, that could not change the law.

In quoting from the case of *Dawkins* v. *Lord Paulet*, L. R. 5, Q. B. 94, the court further said:

> Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not.

And in quoting from the opinion in *Dawkins* v. *Lord Rokeby*, L. R., 8 Q. B. 255, the court said:

> "The authorities," it was said, "are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law."

It thus appears that in four instances since the decision of the *White* v. *Nicholls* case, this court has recognized that there is in this country a class of absolutely privileged communications. The relation of the parties establishes the occasion, and when such occasion appears to exist the motives are immaterial, and neither malice nor untruth can avail the plaintiff.

It is submitted that such a recognition on four occasions by this court of the doctrine of absolute privilege is a complete refutation by this court of the dictum contained in the earlier case of *White* v. *Nicholls*.

The only cases cited by counsel for plaintiff, beside *White* v. *Nicholls*, as authority for the proposition

that there is no such thing as an absolutely privileged communication, are:

Masterson v. *Brown*, 72 Fed. 136.

Merchants Insurance Company v. *Buckner*, 98 Fed. 222.

McGehee v. *Insurance Company*, 112 Fed. 854.

None of these cases are authority for the principle broadly stated in the case of *White* v. *Nicholls*.

In *Masterson* v. *Brown* (*supra*) the only point decided, bearing at all upon the questions in this case, was that the cause of action for libel, founded upon publications made in the course of judicial proceedings, does not accrue until the final determination, in favor of the party libeled, of the proceedings in which the publication is made. It is true that there is a discussion in this case of the question of absolute privilege, and the court, relying upon *White* v. *Nicholls*, states that the privilege is not absolute, that the action for libel in a judicial proceeding will not be rejected, but plaintiff will be compelled to show that the matter laid as libelous was false and was published maliciously, and without probable cause. This, however, was not *the point decided by the case*, which was as to the time when such a cause of action accrued.

The case of *Merchants Insurance Co.* v. *Buckner* (*supra*) presents only a question of qualified privilege, and the court, in commenting upon *White* v. *Nicholls*, recognizes that the facts of that case constitute only a case of qualified privilege, and refers distinctly to that case as one in which a question of

qualified privilege was discussed. "It is not claimed," said the court, "that this communication comes within the class known as *absolutely privileged*, but that it is, rather, entitled to a qualified privilege." In this manner Justices Taft, Lurton, and Day, who sat in the case of *Merchants Insurance Company* v. *Buckner*, adopt the principle of absolute privilege which had been rejected in the *White* v. *Nicholls* case.

In *McGehee* v. *Insurance Company* (*supra*) the case of *White* v. *Nicholls* is not referred to in the opinion of the majority (Circuit Judges Pardee and Shelby), who held that—

> The allegations in an answer filed in that suit, to the effect that the plaintiff had intentionally burned or procured to be burned the property, goods, and effects claimed to have been lost, and that in the proofs of loss the plaintiff had grossly and fraudulently overestimated their value, whereby the policy had been avoided, were relevant and pertinent as matters of defense, and are absolutely privileged.

Circuit Judge McCormick, in his dissenting opinion, based his dissent solely upon the authority of *White* v. *Nicholls*.

To sum up, the reason for the rule that allegations in pleadings in judicial proceedings are absolutely privileged though malicious and untrue, provided they be pertinent and material to the issues involved, is that suitors must be allowed full scope in the state-

ment of facts which may affect the determination of their rights and wrongs by the court. The dictum of *White* v. *Nicholls*, which would take away the absolute privilege, and which would impose upon the plaintiff suing upon a libel uttered in the course of a judicial proceeding the burden of proving actual malice, would tend to stop litigants from setting forth facts pertinent and material upon which their rights may depend, and would inevitably hamper courts in the due administration of justice.

The limitation upon the rule, that the matters pleaded must be pertinent and material, is a sufficient safeguard to prevent the abuse of the privilege. But, as has frequently been said, the words "pertinent and material" are not the most accurate to express the limitation of the privilege, and a judicial preference has been repeatedly expressed for the words "having reference" or "made with reference," or "having relation to the cause or subject matter," as shown by the quotation from the case of *Harlow* v. *Carroll*, 6 App. D. C. 128, appearing on page 25 of this brief.

In the present case, it is, we think, too clear to require argument that the words complained of as libelous, set out in the answer of the defendants to plaintiff's petition for mandamus, as the grounds or reasons for which she was discharged as a teacher by the Board of Education, not only "had reference" or were "made with reference" to the issues involved, but, in the language of Chief Justice Shaw, "had relation to the cause or subject matter," but that

they were immediately pertinent and material to the issue, which was this: Had, or had not, the Board of Education the right to dismiss Miss Nalle as a teacher?

III.

The second count of the amended declaration states no cause of action.

If we are correct in our contention that the words used by the defendants in their answer to the petition for mandamus were privileged, then they had the right to use them. As the second count of the amended declaration differs from the first count merely in charging a conspiracy to use the same words complained of in the first count, it sets forth no cause of action; for in effect it merely charges the defendants with having conspired to do something which they had the right to do. Conspiracy to do a lawful act, by lawful means, can never be made a ground of action. An act lawful in itself, and violating no right, can not be made actionable on account of the motive which superinduced it.

The case of *Adler* v. *Fenton*, 24 How. 407, was an action on the case for conspiracy to enable debtors to dispose of their property in fraud of creditors. The court said (p. 410):

> The action can not be sustained, because there has been a conspiracy or combination to do injurious acts. In *Savile* v. *Roberts*, 1 Lord R. 374, Lord Holt said, "it was objected at the bar against these old cases, that they were grounded upon a conspiracy, which is of an odious nature, and therefore sufficient ground

for an action by itself. But to this objection he answered, that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution." There are cases of injurious acts for which a suit will not lie, unless there be fraud or malice concurring to characterize and distinguish them. But in these cases the act must be tortious, and there must be consequent damage. *An act legal in itself, and violating no right, can not be made actionable on account of the motive which superinduced it.* (The italics are ours.)

In *Porter* v. *Mack*, 50 W. Va. 581, it was said:

> The action is trespass on the case in the nature of a conspiracy to destroy plaintiff's business. . . . The gist of the action is the injury produced, the gravamen the unlawful act done or performed for the purpose of affecting the injury. There can be no conspiracy to do that which is lawful, although it be done maliciously and operates to injure another in person or property. 6 Am. & En. Enc. Law (2d Ed.), 872, 875; Cooley on Torts, 93; *Jenkins* v. *Fowler*, 24 Pa. 308; *Raycroft* v. *Tayntor*, 68 Ver. 219; *Phelp* v. *Newlen*, 72 N. Y. 39; *Iron Co.* v. *Uhler*, 75 Pa. St. 467.

In the case of *Severinghaus* v. *Beckman*, 9 Ind. App. 388, the court said:

> In section 361 Mr. Bishop (Non-Contract Law) says: "Civil actions which are improperly called conspiracy, such as deceit, slander, seduction, and various others where a conspiracy

is needlessly alleged, and the allegation is treated as surplusage, are governed, not by the law of conspiracy here stated, but by the rules pertaining to the class to which they belong." * * *

Our conclusion, then, is, that where a conspiracy is alleged to have been formed to commit an act which, if done by one alone, would be an actionable wrong, or where the conspiracy charged is not, by law, a crime, then the conspiracy is not the *gravamen* of the action, and the tort, for the accomplishment of which it was formed, must be well pleaded before the complaint can repel a demurrer.

Kimball v. *Harman*, 34 Md. 407:

An act which, if done by one alone, constitutes no ground of an action on the case, can not be made the ground of such action by alleging it to have been done by and through a consipracy of several. The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie. *Hutchins* v. *Hutchins*, 7 Hill, 104; *Wellington* v. *Small*, 3 Cush. 145; *Adler* v. *Fenton*, 24 How. 407; *Cotterell* v. *Jones*, 11 C. B. 713.

Van Horn v. *Van Horn*, 56 N. J. L. 318, 323:

The courts almost uniformly disregard the charge of conspiracy as an actionable element, and consider the malicious injury and the resulting damage as the foundation and support of the action. *Laverty* v. *Vanarsdale*, 65 Pa. St. 507.

Pollock on Torts, 267, says: "It seems to be the better opinion that the conspiracy is not in

any case the gist of the action, but is only matter of inducement or evidence."

O'Callaghan v. *Cronan*, 121 Mass. 114:

> The allegations of conspiracy, illegality, falsehood and malice will not support this action, unless either the purpose intended, or the means by which it was to be accomplished, is shown to be unlawful. *Adler* v. *Fenton*, 24 How. 407; *Bowen* v. *Matheuson*, 14 Allen, 499. No such unlawfulness appears upon the face of this declaration. * * * The declaration therefore shows no cause of action.

See also:

Rice v. *Coolidge*, 121 Mass. 393.

U. S. ex rel. McManus v. *Moore*, 3 MacA. 226.

It is submitted that the alleged libelous matter, being incorporated in the answer of the defendants in a judicial proceeding, was *absolutely privileged*, and its use in such proceedings was lawful. The use of the words complained of was an act legal in itself, and was in violation of no right of the plaintiff, and can not therefore be made actionable upon the theory of conspiracy.

It is respectfully submitted that the record discloses no error, and that the judgment should be affirmed.

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